Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RODNEY TODD, as Special Administrator of the Estate of TIFFANY TODD, a deceased minor,

Petitioner,

v.

SOCIETE BIC, S.A., and BIC CORPORATION

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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131 pp

QUESTIONS PRESENTED

Whether the circuit court, sitting in diversity, erred in refusing to follow an express applicable rule of law enunciated by the highest court of a state while applying instead a conflicting dictum formulated by an intermediate state court in a different case.

PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Seventh Circuit are listed in the caption.

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October Term, 1994

RODNEY TODD, as Special Administrator of the Estate of **TIFFANY TODD**, a deceased minor,

Petitioner,

-against-

SOCIETE BIC, S.A., and **BIC CORPORATION**,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Rodney Todd, as Special Administrator of the Estate of Tiffany Todd, a deceased minor, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

Seventh Circuit.

[1] The opinion of the Seventh Circuit Court of Appeals, *en banc*, affirming the grant of summary judgment for Respondents, together with the dissenting opinions of Judges Cummings, Cudahy, Flaum, Rovner and Ripple (Appendix A, infra, pp. A1-A31) is reported at 21 F.3d 1402.

[2] The opinion and order of the Seventh Circuit Court of Appeals, *en banc*, ordering the certification of certain questions of law to the Illinois Supreme Court pursuant to Circuit Court Rule 52 and Rule 20 of the Rules of the Illinois Supreme Court (Appendix B, infra, pp. B1-B26) is reported at 9 F.3d 1216.

[3] The order of the Seventh Circuit Court of Appeals, *en banc*, vacating the original panel's decision reversing the district court (Appendix C, infra, pg. C1) is reported at 991 F.2d 1344.

[4] The original opinion of the Seventh Circuit Court of Appeals reversing the district court's granting of summary judgment for Respondents (Appendix D, infra, pp. D1-D17) is reported at 991 F.2d 1334.

Illinois Supreme Court.

The Order of the Illinois Supreme Court declining to answer the questions of law certified by the Seventh Circuit Court of Appeals (Appendix E, infra, pg. E1) is not officially reported.

District Court.

The memorandum opinion and order of the district court granting Respondents' motion for summary judgment (Appendix F, infra, pp.F1-F14) is not officially reported.

BASIS FOR JURISDICTION

The original judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 27, 1993. (Appendix D, infra, pp. D1-D17). On , 1993, the court of appeals, following the timely filing by Respondents of a petition for rehearing, ordered that the case be reheard *en banc*. (Appendix C, infra, pg. C1). On November 11, 1993, the circuit court, *en banc*, ordered certain questions of law certified to the Illinois Supreme Court. (Appendix B, infra, pp. B1-B26). On November

22, 1993, the Illinois Supreme Court declined to answer the questions certified by the circuit court. (Appendix E infra, pg. E1). On April 12, 1994, the circuit court, sitting *en banc*, reversed the judgment of the original circuit court panel and affirmed the district court's granting of summary judgment for Respondents. (Appendix A infra, pp. A1-A31). A timely filed petition for rehearing was denied on May 26, 1994, (Appendix A, infra, pp. A32-A33). This Honorable Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const. amend. X.

> The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1652

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

In 1985, a petition (No. 85-2) was submitted to the Consumer Products Safety Commission to require that all disposable butane lighters be made child resistant. 16 CFR 1210 *et seq.* Information available to the Commission at that time showed that residential fires started by children playing with cigarette lighters claimed an estimated 140 lives each year of which 125 were children five years old or younger. *Id.* During the following two years, field study conducted by the Commission concluded that of the two-hundred and seventy fires started around the United States by children playing with identified lighters, 96% involved disposable butane models similar to the Bic Mod II at issue here. *Id.* In December of 1987, the Commission

voted to grant petition No. 85-2. *Id.* At that same time, the Commission further voted to publish advance notice of proposed rule making for child-resistant cigarette lighters. *Id.* In this atmosphere of impending governmental regulation, the Respondents developed an inexpensive, disposable butane lighter that required two handed operation making it therefore significantly child-resistant according to the tests of that improved design conducted under the auspices of the Consumer Products Safety Commission. For the sake of the summary judgment motions in the case *sub judice*, Respondents conceded that in 1988 it was foreseeable that small children would operate disposable butane lighters. Respondents further conceded in the record that in 1988 an alternative, inexpensive, child-resistant lighter

design was feasible for its Bic Mod II lighter.

In the early morning hours on March 27, 1988, Cori Smith, aged four, found a green Bic Mod II disposable lighter on the end table in the family room of the house in which she lived with her parents and the Petitioner's family. Cori took the lighter and used it to ignite some papers on the floor of the bedroom which she shared with the twenty-three month old decedent, Tiffany Todd. By the time any of the adults in the house were alerted to the fire, it had become so intense that nobody could get into Tiffany's room to save her. All of the other resident of the home got out safely except Tiffany Todd who perished in the blaze.

The Proceedings below. This action was commenced in the Circuit Court of Cook County, Illinois and was removed by Respondents to federal district court pursuant 28 U.S.C. § 1332. The Petitioner's complaint sought damages under three counts of strict products liability and negligence and alleged that the Bic Mod II lighter manufactured by the Respondents was foreseeably attractive to children without containing adequate child-proof or child-resistant safety devices making said lighter unreasonably dangerous.

Under Illinois law there are two ways to prove that a product's design is defective for the purpose of a strict product's liability case. *Lamkin v. Towner*, 563 N.E.2d 449 (Ill. 1990). Plaintiff may show a defective design;

> (1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner or (2) by introducing evidence that the product's design proximately caused his injuries and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs.

Id. N.E.2d at 457.

The first method of proof available to a Plaintiff to show a design defect is known as the consumer or user contemplation test. *Id.* The second method of proof available to an Illinois plaintiff is commonly known as the "danger-utility" test. Prosser & Keeton on Torts, (5th Ed. 1984) at pp. 698-702.

Respondents moved for summary judgment alleging that they did not owe a duty to the decedent to manufacture Bic Mod II lighters with child-proof or child-resistant

features. For purposes of the summary judgment motion, Respondents conceded that it was foreseeable that a child of Cori's age might obtain and operate a BIC Mod II lighter. BIC also conceded, for purposes of summary judgment, that it was feasible to design and manufacture a lighter with enhanced child-resistant features. Bic further conceded that they had in fact developed such a lighter but had not placed it into the stream of commerce.

Ruling on Respondents' summary judgment motion, the district court held that Respondents did not have a duty to manufacture lighters with child-proof devices. The basis for this ruling was the court's belief that lighters are intended to be used by adults and that the danger from fire is open and obvious to the average adult consumer. The

district court reasoned that since the lighter in question did not fail to perform in the manner expected of it in view of its intended function, there was no breach of any duty by the Respondents in designing and distributing its product without child-resistant guarding. In so ruling, the district court applied only one of the two necessary tests mandated by the Illinois Supreme Court in *Lamkin*, a case involving a window screen alleged to be defective because its manner of installation was inadequate to prevent the fall of an infant from the window. The district court did not apply the danger-utility test and chose instead to apply only the consumer contemplation test.

The Seventh Circuit reversed. The court found that it was bound by the Illinois Supreme Court's decision in *Lamkin v. Towner* and therefore held that the district court erred in basing its determination solely on the consumer contemplation test and in failing to apply also and alternatively, the risk-utility test. The court noted that this was true especially in light of Respondents' concession that a safer, inexpensive, alternative design with child-resistant features was feasible. Further, the circuit court held that the consumer contemplation test, as interpreted by the Illinois Supreme Court in *Doser v. Savage Mfg. and Sales, Inc.*, 568 N.E.2d 814 (Ill. 1991) was misapplied by the district court. The circuit court held that under Illinois law, the consumer contemplation test is to be applied from the point of view of all foreseeable

users and not just from the point of view of the ordinary purchaser or so called "intended user" as the district court had found.

The Seventh Circuit, sitting *en banc* and without the author of the original decision, vacated the order of the original panel. On rehearing, the circuit court affirmed the district court's grant of summary judgment on the issue of inadequate warning. Further, the circuit court chose to certify two very narrowly drawn questions to the Illinois Supreme Court.

1. Whether the "consumer" for purposes of the consumer contemplation test includes non-purchasers who the manufacturer should foresee will use or misuse the product.

2. Whether the risk-utility test applies to consumer products whose risks can be appreciated by their intended users.

On November 22, 1993 the Illinois Supreme Court respectfully declined to answer the questions certified on the record before it.

Thereafter, again sitting *en banc*, in a 6-5 decision, (6-6 when the vote of Judge Kaufman, the author of the original opinion, is counted) the circuit court upheld the district court's grant of summary judgment for Respondents. In so ruling, the circuit court noted that it considered Illinois product's liability law to be "not developed" and thus it needed to "determine what the Illinois Supreme Court would decide." (Appendix A, infra, pg. A5). The circuit court majority then found that it would not follow *Lamkin v. Towner*, the very case relied on by the original court in reversing the district court, and by the

five judges in dissent. Instead, the circuit court chose to apply a rule of law enunciated by an Illinois intermediate appellate court in a decision which is in express conflict with the rule of decision laid down by the Illinois Supreme Court in the Lamkin case, and declared the conflicting lower court decision as dispositive of the case *sub judice*. The intermediate court's opinion in *Scoby v. Vulcan-Hart Corp.*, 569 N.E.2d 1147 (Ill. App. 1991), in its expressed repugnance for the rule laid down by the Illinois Supreme Court in *Lamkin*, had stated that "somewhere, a line must be drawn beyond which the danger-utility test cannot be applied." Id at 1151. The Illinois Supreme Court has never said that, nor anything remotely importing that.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the authority of a federal court, whether, sitting in diversity, it can to elect to follow the ruling of an intermediate state appellate court when that intermediate appellate court's decision is in direct conflict with binding rules of decision expressed by the state's highest court.

Based on the traditional constitutional hierarchical authority on which judicial responsibility is organized in Illinois, the intermediate appellate court is without legal authority to draw any line beyond which it would not obey the authority of a rule of decision of the Illinois Supreme Court. Yet, in the present case, the circuit court chose to ignore the law as directed

by the highest court in the State of Illinois. Then, in searching out some legal basis for that action, the circuit court seized on what is clearly dicta in the opinion of the intermediate appellate court's opinion in *Scoby*, to do this. Then, in an attempt to remain within the bounds commanded by this Honorable Court and 28 U.S.C. § 1652, the circuit court resorted to simply closing its eyes to the authority of the Illinois Supreme Court and then heavy-handedly dismissed the wisdom and edict of The Illinois Supreme Court in the rule of the Lamkin case as mere dictum. (Appendix A, infra, A17).

It is hornbook law that this Honorable Court's decision in *Erie v. Thompkins*, 304 U.S. 64 (1938), and its progeny, mandates that federal courts sitting in diversity

On or about that time, Rodney Todd, Sr. advised Cori Smith not to play with lighters or matches because of the potential danger posed by fire. Darlene had also given Cori a similar warning. Cori Smith has testified that she was aware of the danger of playing with matches or lighters prior to the fire which caused Tiffany Todd's death.

Rodney Todd, Sr. initiated this action in March 1990 on behalf of the estate of his daughter, Tiffany Todd. The complaint alleges three counts based upon strict products liability and three counts based upon negligence. Although the plaintiff recognizes that BIC lighters carry a warning which states "Keep out of reach of children," the plaintiff's claim rely heavily on his contention that the BIC lighter at issue in this case was unreasonably dangerous because it did not include a child-resistant device and did not provide adequate warnings. BIC now moves for summary judgment on the case pursuant to Federal Rule of Civil Procedure 56.

The Summary Judgment Motion

Summary Judgment is appropriate in a case where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.

Wolf v. Fitchburg, 870 F.2d 1327 (7th Cir. 1989). After the moving party makes a properly supported motion for summary judgment, the nonmoving party bears the burden of refuting the motion by setting forth specific facts showing the existence of a genuine issue of fact for trial. Shlay v. Montgomery, 802 F.2d 918, 920 (7th Cir. 1986). When assessing a motion for summary judgment, the court must view all evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmoving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Counts I, II, and III of the plaintiff's complaint allege a strict liability action against the defendants. The Illinois Supreme Court adopted the theory of strict products liability in Suvada v. Shite Motor Company, 32 Ill.2d 612, 210 N.E.2d 182 (1965). In Suvada, the court adopted the position taken in Section 402A of the American Law Institute's revised Restatement of the Law of Torts.[1] To recover in strict

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[1]Section 402A requires:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer of to

liability under Illinois law "the injury must result from a condition of the product, the condition must be unreasonably dangerous and the condition must have existed at the time the product left the manufacturer's control." Hunt v. Blasius, 74 Ill.2d 203, 210, 384 N.E.2d 368 (1978); see also First National Bank of Dwight v. Regent Sports Corp., 803 F.2d 1431, 1436 (7th Cir. 1986). It is also well-recognized under Illinois law that a failure to warn of a

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his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to reach the user or consumer in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

product's dangerous propensities may serve as the basis for holding a manufacturer of seller strictly liable in tort. Woodill v. Parke Davis & Co., 79 Ill.2d 26, 402 N.E.2d 194, 196 (1980); First National Bank of Dwight. 803 F.2d at 1436.

Manufacturers are thus under a non-delegable duty to produce a product that is reasonably safe. Coney v. J.L.G. Industries, Inc., 97 Ill.2d 104, 454 N.E.2d 197, 203 (1983). In order to classify a product as unreasonably dangerous, "the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." First National Bank of Dwight, 803 F.2d at 1436 (citing Restatement (Second) of Torts § 402A, comment i (1964). The Illinois Supreme Court has stated that:

> Virtually any product is capable of producing injury when put to certain uses or misuses...Injuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product. The injuries must derive from a distinct defect

> in the product, a defect which subjects those exposed to the product to an unreasonable risk of harm." Hunt, 74 Ill.2d at 211-12, 384 N.E.2d at 372.

Defendant BIC asserts that it is entitled to summary judgment on the strict liability claims because BIC did not owe Todd a duty to manufacture BIC lighters with child-proof devices. The plaintiff counters that BIC owed him such a duty because without such a child-proof device, BIC's lighter is unreasonably dangerous. The question of whether defendant BIC had a duty to manufacture its lighters with child-proof devices is a questions of law and therefore must be determined by the court. Ward v. K Mart Corp., 136 Ill.2d 132, 554 N.E.2d 223 (1990). A court in this district addressed this exact question in a factually similar case. In Scarpetta v. Health-Tex Corp., Anthony Scarpetta left his BIC lighter on the coffee table on the first floor of his friend's, Susan Johnson, home and then went upstairs. 1990 U.S. Deist. LEXIS 5119 (April 26, 1990). The plaintiff, three-year-old Jennifer Scarpetta, and Johnson's two children, six and one-half-year-old Gabriel and four-year-old Jessica, remained downstairs. When Gabriel tried

to show the other children how to light the lighter, he dropped the lighter on Jennifer's shirt. Anthony Scarpetta rushed downstairs when he heard screams and found Jennifer with her shirt on fire. He put out the fire and Susan Johnson called the paramedics. Id.

The court in Scarpetta granted defendant BIC's motion for summary judgment on the strict liability claims because the court found that the BIC lighter was not unreasonably dangerous. The court determined that the ordinary consumer of a lighter is an adult who is capable of contemplating the danger of the lighter's characteristics. Id. The court also determined that the lighter did not fail to perform in the manner expected considering its nature and intended function. Therefore, the injury, while unfortunate, was not the result of a danger unrecognizable to the average consumer. Id. In addition, the court held that the lighter's attached warning to keep it away from children sufficed to avoid liability in this case. The court found that the lighter was not unreasonably dangerous if used according to the warning's instructions and held as a matter of law that plaintiff's claims did not support a strict products liability action. Id.

Courts in other jurisdictions which follow the Restatement's interpretation of strict liability law have reached similar conclusions. For example, in Byler v. Scripto-Tokai Corp., the court determined that the defendant's failure to manufacture a child-proof lighter did not support the plaintiff's strict liability claim. The court stated:

> ...This court concludes, as a matter of law, that the defendant had no duty to child-proof its lighters and the lighter was not unreasonably dangerous. To hold otherwise would require the court to conclude that the manufacturers of lighters, matcher, stoves, and other potentially flammable items have a duty to child-proof their products. Here, the defendant's product performed the function it was intended to perform and prudent manufacturers, being aware of the risk to children, would as defendant did here, place this product in the stream of commerce. A product is not unreasonably dangerous under Kentucky law and therefore defendant is entitled to summary judgment on the issue. No. 89-0016-L (D. Ky. July 27, 1990).

Similarly, the court in Lasseigne v. BIC Corporation recognized that simply because in the hands of a child an item does not function as it is intended or

results in unintended consequences, the item is not necessarily unreasonably dangerous. No. GC-G-88-391 (Fla. Cir. Ct. May 31, 1989); See also Eads v. BIC Corporation, 740 F. Supp. 1433 (W.D. Mo. 1989); Sedlock v. BIC Corporation, 741 F. Supp. 175 (W.D. No. 1990); Wise v. BIC Corporation, No. 88-59914-DP (Mich. Cir, Ct. July 3, 1990); Bean v. BIC Corporation, 89-32821 (Ala. Cir. Ct. June 5, 1991).

Like the courts in the previously cited cases, this court finds that the BIC lighter at issue in this case is not unreasonably dangerous because it is not child-resistant or the warning label is inadequate. The lighter in this case, like the lighter in Scarpetta, is a product ordinarily purchased and used by adults who are capable of contemplating the danger of the lighter's characteristics. Furthermore, the plaintiff does not allege that the BIC lighter failed to perform in the manner expected of a lighter. Tiffany Todd's death, therefore, was not the result of a danger unrecognizable to the average adult consumer.

Tiffany's death was the result of the improper use of the lighter at issue by a child. While tragic and extremely regrettable, this court cannot hold the

defendant liable for the unfortunate accident which caused Tiffany's death. As the court stated in Byler, the lighter cannot be considered unreasonably dangerous because a child's use of the product caused unintended consequences. This court agrees with the court in Byler that to hold otherwise would be to impose a duty on the manufacturers of any potentially flammable product to child-proof these products. Therefore, defendant BIC is entitled to summary judgment on the products liability claims because, as a matter of law, its lighter was not unreasonably dangerous.

This decision comports with the persuasive conclusions drawn in several cases where the courts, relying upon the Restatement's interpretation of strict liability law, did not require adult products to be made child-proof. In Killeen v. Harmon Grain Products, Inc., for example, the plaintiff alleged, among other things, that the defendant manufacturer and seller of cinnamon-flavored toothpicks was liable for the injuries sustained by a ten-year-old girl who fell face down while sucking on one of the defendant's toothpicks. 413 N.E.2d 767 (Mass. App. 1980). The court found that toothpicks, like other sharp objects such as pencils, nails, knives,

and bottles, are not unreasonably dangerous in part due to the fact that the very obviousness of their danger puts the user on notice. "It is part of normal upbringing that one learns in childhood to cope with the dangers posed by such useful everyday items and will be injured, but the policy of our law in such cases is not to shift the loss from the careless user to a blameless manufacturer." Id. at 770. Like the court in Killeen which held that the manufacturer was not liable for failing to child-proof the useful product which posed obvious potential dangers, this court also will not hold BIC responsible on this basis.

The plaintiff contends that public policy requires this court to hold the defendant strictly liable for its product. he plaintiff correctly points out that the Illinois Supreme Court stated in Suvada that public interest in human life and health, the invitations and solicitations to purchase the product, and the justice of imposing the loss on the one creating the risk and reaping the profit are compelling reasons for holding manufacturers of defective and unreasonably safe products liable to injured consumers. 32 Ill.2d 612, 210 N.E.2d at 186. However, as the consumers.

32 Ill.2d 612, 210 N.E.2d at 186. However, as the Suvada court's finding suggests, public policy only requires holding manufacturers and sellers liable if their products, see Scoby v. Vulcan-Hart Corp., 211 Ill. App. 3d 410, 516 N.E.2d 670 (1987). As already discussed, manufacturers are only required to make reasonably dangerous, public policy does not mandate that this court has determined that the defendant's lighter was not unreasonably dangerous, public policy does not mandate that this court hold the defendant strictly liable.

BIC is also entitled to summary judgment on the products liability claims because the warning on the lighter at issue in this case was adequate. As previously noted, a failure to warn of the dangerous propensities of its product can serve as the basis for holding a defendant manufacturer or seller strictly liable in tort. Woodill, 79 Ill.2d 26, 402 N.E.2d at 196; First National Bank of Dwight, 803 F.2d at 1460. However, no duty to warn is warranted when the product is not defectively designed or manufactured, and where the possibility of injury results from a common propensity of the product which is open and obvious. Genaust v. Illinois Power Company, 62 Ill.2d 456, 343 N.E.2d 456

(1976); Restatement Second of Torts, Section 402A, comment i. Given that this court has already determined that the lighter at issue was not defective and the injury resulted from the products obvious propensity for danger, the defendant did not have the duty to warn which the plaintiff suggests. In this case, the defendant nevertheless provided a warning to keep the lighter away from children. According to the Restatement, "Where a warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed is not in a defective condition, nor is it unreasonably dangerous." Restatement Second of Torts, Section 402A, comment i. The defendant in the instant case cannot be held liable for a failure to warn because had the warning on the lighter been heeded, the lighter could have been used safely.

In addition, defendant BIC suggests, and the court agrees, that additional warnings may not have prevented the accident in this case. As explained in the background section of this opinion, the plaintiff and the other adults in the Smith/Todd household testified that they knew of and warned their children about the dangers of playing with lighters or

other flammable devices. Cori Smith also testified that she had been warned of and understood the dangers of playing with such products. These statements suggest that the Todds and the Smiths clearly understood the potential dangers of children playing with lighters and that the warning provided by the defendant was adequate. Since the alleged lack of additional warnings could not have been the cause of the fire at issue in this case, the defendant also is entitled to summary judgment on this basis.

The court's determination that the plaintiff cannot prove his strict products liability claims because the defendant has not violated his duty to manufacturer reasonably safe products and to warn also applies to the plaintiff's negligence claims. To establish a claim for negligence under Illinois law, a plaintiff must prove: 1) the existence of a duty owed by the defendant to the plaintiff, 2) a breach of that duty, and 3) an injury proximately caused by that breach. Ward, 136 Ill.2d 312, 554 N.E.2d at 226. The negligence requirement that the plaintiff establish that the defendant owed him or her a duty is very similar to the duty requirement for

proving strict products liability.[2] As the court stated in Coney, "the breach of duty is the same in both a negligence and strict products liability claim but the key distinction between the negligence and the strict liability claim lies in the fault concept. In a negligence claim, the focus is on the fault of the defendant. In a strict products liability claim, the focus is on the condition of the product, regardless of fault." 97 Ill.2d 104, 454 N.E.2d at 203. Since the duty requirement in a negligence claim is the same as a duty requirement in a products liability claim, and this court has determined that the defendant did not have a duty to manufacture the lighter with a child-resistant device or additional warnings,

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[2] This court respectfully disagrees with the court's holding in Scarpetta regarding the plaintiff's claim that the defendant was liable under negligence law for failing to child-proof its lighters and not providing an adequate warning. See 1990 U.S. Deist. LEXIS 5119. The court in Scarpetta did not conclude that the duty requirement under strict products liability and negligence law were the same. The court therefore decided the duty questions on different factors and reached different results. See Id.

In the
United States Court of Appeals
For the Seventh Circuit

No. 92-1201

RODNEY TODD, as Special Administrator
of the Estate of Tiffany Todd,

Plaintiff-Appellant,

v.

SOCIETE BIC, S.A., and BIC CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 5487—**Ann Claire Williams**, *Judge.*

ARGUED SEPTEMBER 8, 1993—CERTIFIED NOVEMBER 12, 1993
CERTIFICATION DENIED NOVEMBER 22, 1993—
DECIDED APRIL 12, 1994

Before POSNER, *Chief Judge*, and CUMMINGS, BAUER, CUDAHY, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, *Circuit Judges.*

MANION, *Circuit Judge.* Two-year-old Tiffany Todd died tragically when four-year-old Cori Smith used a Bic lighter to start a fire in Tiffany's bedroom. Tiffany's estate sued the lighter manufacturer and the district court granted summary judgment in favor of the defendants. After re-

hearing the appeal *en banc*,[1] a majority of this court concluded that the warning printed on the lighter—"KEEP OUT OF REACH OF CHILDREN"—was adequate, and that summary judgment on the issue of duty to warn was proper. However, to ensure that the law we applied on the other issues in the case was genuine state law, we certified to the Illinois Supreme Court questions which examined the proper application of the *consumer contemplation test* and the *risk-utility test* under Illinois products liability law. The Illinois Supreme Court promptly declined to answer the certified questions. These issues thus return to this court sitting *en banc*.

Generally, this case concerns Illinois strict products liability law. In Illinois and elsewhere, strict products liability law evolved as a "special rule applicable to sellers of products",[2] which went beyond the traditional boundaries of warranty and negligence law, to provide a broader method of recovery for persons injured by defective products. *See*

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[1] This appeal was first heard by a panel of this court over a year ago. After rehearing *en banc*, this court certified two questions to the Illinois Supreme Court, which declined certification. *See Todd v. Societe Bic*, 991 F.2d 1334 (7th Cir. 1993) (original panel's decision); *Todd v. Societe Bic*, 991 F.2d 1344 (7th Cir. 1993) (order vacating original panel's decision); *Todd v. Societe Bic*, 9 F.3d 1216 (7th Cir. 1993) (*en banc* decision certifying certain questions to the Illinois Supreme Court); *Todd v. Societe Bic*, No. 7643 (November 22, 1993) (Illinois Supreme Court order declining certification).

In his dissent Judge Ripple is highly critical of this court's majority for taking the case *en banc* and for "imposing ideological discipline on fellow federal judges." Ripple, J., dissent at 28. Curiously, Judge Ripple voted with eight other judges to rehear this case *en banc*. He also concurred in this court's certification order which spelled out several reasons for going *en banc*. *See Todd*, 9 F.3d 1216. In that concurrence, he indicated his legal preference for resolving the issue should the Illinois Supreme Court decline certification. Now that the Illinois Supreme Court has declined certification, we are required to apply Illinois products liability law. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Our discussion is confined to the legal issues at hand.

[2] *See* Restatement (Second) of Torts § 402A, cmt. a (1965).

William L. Prosser, *Law of Torts*, 641-682 (4th ed. 1971). Although the scope of strict products liability law is broader than negligence or warranty law, it is not unlimited. Only those who sell "unreasonably dangerous" products fall within its reach. Restatement (Second) of Torts § 402A.

In this case we consider whether a manufacturer should be subject to liability for producing a disposable lighter which a child used to start a deadly fire. This inquiry pivots on one basic question: whether a disposable lighter is unreasonably dangerous under Illinois strict products liability law. The district court determined that a lighter is not unreasonably dangerous, and granted summary judgment for the manufacturer. The plaintiff appeals. We now affirm the district court's grant of summary judgment.

I. Background

Two young families, the Smiths and the Todds, shared a house in rural Earlsville, Illinois. All four adults in the house smoked, and all used disposable cigarette lighters. About a week before the fire which caused the death in this case, four-year-old Cori Smith got hold of one of these lighters and set a small fire in her parents' bedroom. The fire was quickly extinguished, and Cori's parents admonished her never to play with lighters or matches. The adults also warned the other five children who lived in the house about the dangers of fire.

The next Sunday, March 27, 1988, Cori awoke before her parents and went downstairs, where her brother was watching cartoons. She spied a green lighter on an end-table in the living room. She took the lighter upstairs into a bedroom where twenty-two month old Tiffany Todd was sleeping. Cori used the lighter to ignite some papers which were on the floor. She then took the lighter back downstairs and replaced it on the end-table. The adults did not wake in time to prevent the ensuing conflagration. Tiffany Todd was killed in the fire. Everyone else escaped unharmed.

On behalf of her estate, Tiffany's father, Rodney Todd, sued the lighter's manufacturer, Bic Corporation, claiming that the company was negligent and strictly liable for selling a defective product. Todd rested both his negligence and strict liability claims primarily on allegations that the lighter was unreasonably dangerous because it did not include a child-resistant feature, and did not provide an adequate warning. After some discovery, Bic moved for summary judgment. Bic never denied that it was possible to manufacture a lighter with child-resistant features. In fact, undisputed evidence adduced in discovery showed that at the time of the fire Bic had developed a prototype lighter which was child-resistant—because it required greater dexterity to operate—although not child proof. Bic contended, however, that the lighter Cori used was not unreasonably dangerous to consumers. Bic also vigorously defended the adequacy of the warning it placed on the lighter. The warning on the lighter which Cori found on the end-table while her parents slept, read simply, "KEEP OUT OF REACH OF CHILDREN."

In a comprehensive order, the district court granted summary judgment for Bic. The court determined that an ordinary lighter, which did nothing more than provide the small flame it was intended to provide, was not defective; therefore, Bic was neither strictly liable nor negligent. The court also considered the lighter's warning and concluded that it was adequate. Finally, the court addressed the various public policy arguments Todd raised in favor of imposing liability on Bic. The court dismissed these arguments out-of-hand, noting that "public policy only requires holding manufacturers and sellers liable if their product is found to be defective or unreasonably dangerous . . . ." *Todd v. Societe Bic*, No. 90 C 5487 at page 11 (N.D. Ill. January 7, 1992).

Todd appealed, claiming that the district court ignored questions of fact about the inherent defects in disposable lighters. He maintained that Illinois authorized two tests to determine whether a product is unreasonably dangerous: the consumer contemplation test and the risk-utility

test. He argued that a disposable lighter might be considered unreasonably dangerous under either test. He also insisted that the district court's failure to even consider aspects of the risk-utility test required reversal of the summary judgment. Finally, he continued to challenge the adequacy of the warning, claiming that deficiencies in the warning, standing alone, rendered the lighter unreasonably dangerous.

A divided panel of this court agreed with Todd and reversed the district court's grant of summary judgment. 991 F.2d 1334 (1993). The full court vacated that holding, and decided to rehear the case *en banc*. 991 F.2d 1344 (1993). "Concern about the implications of the panel's reasoning lead the full court to vacate the panel's decision and set the case for rehearing *en banc*." *Todd*, 9 F.3d at 1218. After the rehearing, the full court was divided on what the proper disposition of this case should be. The court unanimously agreed that the district court was correct in its conclusion that the warning on the lighter was adequate as a matter of law. However, a majority of the court decided to certify certain questions about strict products liability law to the Illinois Supreme Court. *Todd*, 9 F.3d at 1216.

The Illinois Supreme Court declined certification. *Todd*, No. 7643 (November 22, 1993). That decision placed this case back before the *en banc* court. We will resolve the issues of state law which this case presents in accordance with the decisions of the Illinois Supreme Court. *See* Charles A. Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure* § 4507 at 89 (1982) ("federal court must determine issues of state law as it believes the highest court of the state would determine them"). Where areas of state law are not developed, we will resort to other persuasive authority in an attempt to determine what the Illinois Supreme Court would decide. *See Heller Intern. Corp. v. Sharp*, 974 F.2d 850, 858 (7th Cir. 1992).

II. Analysis

A. Section 402A

Strict products liability grew out of a jurisprudential movement to adjust traditional tort and warranty theories in order to facilitate recovery for consumers injured by defective products. *See* William L. Prosser, *Law of Torts*, 641-682 (4th ed. 1971). This movement spawned the notion of strict products liability—that a manufacturer should be liable to an injured consumer regardless of the degree of care employed in producing the product. *Id.* at 656-657. The concept of strict products liability gained widespread acceptance in the early 1960's after the American Law Institute reduced the broad hypothesis to more definite standards when drafting the Second Restatement of Torts, Section 402A. Illinois soon joined other jurisdiction in adopting Section 402A. *Suvada v. White Motor Co.*, 210 N.E.2d 182 (1965).

Negligence and warranty theories are still available for plaintiffs injured by defective products. *See* Section 402A, cmts. a and m. In fact, Todd has made a negligence claim in this case, which we will address later. But injured plaintiffs seem to favor strict products liability, primarily because it does not include traditional warranty law's damage and privity limitations, or traditional negligence law's fault element. *See* Section 402A, cmts. a and m; *see also Suvada*, 210 N.E.2d 182 (providing history of strict products liability in relation to traditional contract and tort law). While broader than historic negligence and warranty law, strict products liability is not all-encompassing; it does not cover every injury involving a product. Some aggressive litigants, nevertheless, consider Section 402A as a mandate to compensate every consumer injured by a manufactured product. The Illinois Supreme Court has specifically criticized this approach on a number of occasions. *See, e.g., Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 199 (Ill. 1980) ("[s]trict liability is not the equivalent of absolute liability"); *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197, 200 (Ill. 1983) ("imposition of strict liability

was not meant to make the manufacturer an absolute insurer"); *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 344 (Ill. 1990) (unwarranted expansion of strict liability law is not appropriate "to achieve what is perceived as socially satisfying result.").

Therefore, although broad, strict products liability law is limited by certain formulas and boundaries. Section 402A generally sets forth these limitations:

> § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The comments to Section 402A also define its limits. Basically, in order to recover under that section, "[t]he plaintiffs must prove that their injury or damage resulted from the condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time it left the manufacturer's control." *Suvada*, 210 N.E.2d at 188.

In this case, the district court applied Section 402A to the undisputed facts, and determined that a cigarette lighter is not unreasonably dangerous. Whether a product may be

considered unreasonably dangerous is a question of Illinois law which we review *de novo*. *Derrico v. Bungee Intern. Mfg. Co.*, 989 F.2d 247, 249 (7th Cir. 1993); *Belline v. K-Mart Corp.*, 940 F.2d 184, 186 (7th Cir. 1991).

1. Consumer Contemplation Test.

Section 402A authorizes a simple test to determine whether a product is unreasonably dangerous: "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Section 402A, cmt. i. That test has come to be known as the consumer contemplation test. W. Page Keeton, *Prosser and Keeton on Torts*, 698-99 (5th ed. 1984). The Illinois Supreme Court follows the Restatement's formulation of the test almost verbatim: "[a] product is 'unreasonably dangerous' when it is 'dangerous to extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.' " *Lamkin v. Towner*, 563 N.E.2d 449, 457 (Ill. 1990).

The consumer contemplation test separates defective products from the universe of ordinary products which may be involved in causing injury. Under this test, a product is only considered defective or unreasonably dangerous if it fails to perform in a manner the ordinary consumer would expect. Therefore, a pair of rubber soled shoes are not unreasonably dangerous simply because the person wearing them slips on a wet floor, because "[i]t is a matter of common knowledge that shoes are more likely to slip when wet than dry . . . ." *Fanning v. LeMay*, 230 N.E.2d 182, 184 (Ill. 1967). But if a hammer breaks when striking a steel peg, sending a metal fragment into the user's eye, the hammer is unreasonably dangerous because ordinary consumers do not expect hammers to chip on impact. *Dunham v. Vaughan & Bushnell Mfg. Co.*, 247 N.E.2d 401 (Ill. 1969). Law reporters are full of cases illustrating the important distinction between those products that meet consumer expectations and those that do

not. The Restatement's drafters provided a simple exercise to clarify this distinction:

> Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whisky, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

Section 402A, cmt. i.

The consumer contemplation test is an important aspect of Section 402A, because it prevents imposing absolute liability on manufacturers. Without this test, injured plaintiffs would be heard to argue that the fact of their injury establishes a product's dangerous propensities. The test heads off this type of after-the-fact rationale by recognizing that virtually any product can cause injury when put to certain uses: "ordinary sugar is deadly poison to diabetics, and caster oil found use under Mussolini as an instrument of torture." Section 402 A, cmt. i. The consumer contemplation test assures that products are not considered unreasonably dangerous simply because they have conceivable unsafe uses. The test focuses not in hindsight on the injury which occurred, but on the ordinary consumer's expectations when purchasing and using the product.

This discussion brings us to the seminal question in this case: what does an ordinary consumer expect when he purchases a lighter? Quite obviously, the consumer expects the lighter, when activated, to provide a flame. That is exactly how the lighter in this case performed. But the lighter was used to do more; the small flame it produced

was used to ignite some papers, causing a deadly fire. The ordinary consumer expects that if a lighter's flame is put to some other combustible object, a larger fire ensues. This makes a lighter dangerous. But it does not make a lighter unreasonably dangerous under the consumer contemplation test. As the Illinois Supreme Court has stated, "[v]irtually any product is capable of producing injury when put to certain uses or misuses . . . . Injuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product. The injuries must derive from a distinct defect in the product, a defect which subjects those exposed to the product to an *unreasonable* risk of harm." *Hunt v. Blasius*, 384 N.E.2d 368, 372 (Ill. 1978). The fact that a lighter starts a fire is one of its inherent properties. That fact does not breach consumer expectations; really it fulfills them. Therefore, a lighter which does nothing more than provide a small flame is not unreasonably dangerous under the consumer contemplation test.

a. Foreseeable user *versus* ordinary consumer.

The plaintiff argues that instead of looking to the expectations of the ordinary consumer, we should look to those of the foreseeable user—in this case a child—when assessing liability under the consumer contemplation test. This expansive view is required, the plaintiff contends, because a child ultimately used a lighter in this case.[3]

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[3] Bic concedes, for the purposes of this appeal, that it is foreseeable that a child might use a lighter. But acknowledging that a child is a foreseeable user is not much of a concession. The printed warning—"KEEP OUT OF REACH OF CHILDREN"—anticipates use by children if adults allow it. The warning points to the child user as the potential abuser. Certainly, a concession that it is foreseeable that a child might use a product is not a concession that the product is unreasonably dangerous. *See Hunt*, 384 N.E.2d at 372 ("[p]roducts liability does not make the manufacturer an insurer of all foreseeable accidents which involve its products . . . ."). If it was, toy stores would be full of unreasonably dangerous products because manufacturers foresee—even intend—that children will use toys.

Some of the leading academic commentators in the area of strict products liability support a reformulation of the consumer contemplation test which measures the expectations of foreseeable users, rather than ordinary consumers. *See* W. Page Keeton, *Prosser and Keeton on Torts*, 698-99 (5th ed. 1984). But we need not concern ourselves with academic speculation when Illinois law is clear. Both the Restatement and the Illinois cases which have adopted it, speak in terms of the "ordinary consumer . . . with the ordinary knowledge common to the community as to [the product's] characteristics." *See Lamkin*, 563 N.E.2d at 457. We therefore look to the expectations of the ordinary consumer, and not the foreseeable user, when assessing liability under the consumer contemplation test.[4]

Reason dictates that children are not ordinary consumers under the consumer contemplation test. Unlike ordinary consumers, children lack knowledge common to the community regarding consumer products. This lack of knowledge makes children particularly unfit subjects for any test meant to measure expectations. Consider the absurd results if courts were required to look to the expectations of children when gauging a product's dangerousness. The pair of shoes in *Fanning*, which the Illinois Supreme Court considered not defective because "[i]t is a matter of common knowledge that shoes are more likely to slip when wet than dry", would be considered defective under any formulation of the consumer contemplation test which measured a child's expectations. *Fanning*, 230 N.E.2d at 184. Children do not share the community's knowledge about a shoe's propensity to slip when wet.

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[4] In a footnote on the last page of his dissent, Judge Ripple posits that the Illinois Supreme Court's decision in *Doser v. Savage Mfg. & Sales, Inc.*, 568 N.E.2d 814, 824 (Ill. 1990), changes the formulation of the consumer contemplation test as it was stated in *Lamkin*, to require courts to measure the expectations of foreseeable users rather than ordinary consumers. But *Doser* never even *mentions* the consumer contemplation test. It has nothing to do with the test. Certainly, the case does not change the test in the way Judge Ripple proposes.

Nor do children perceive the dangers inherent in just about any product. We all had the experience as children of putting a hand on a hot pot or stove. Recall the story about the unfortunate child who expected his Superman cape to allow him to fly. Children engage in these dangerous activities because, in their limited experience, they cannot comprehend the possibility of injury. Any reformulation of the consumer contemplation test which requires a court or jury to assess liability based on a child's product expectations, removes well-designed limitations from section 402A in all cases where a child is injured. Under such a test, manufacturers would face absolute liability every time a child was injured by a product. The child's attorney would march into court and claim the product failed to perform in the manner the child expected. The attorney would be right, but the failure would be due not to a deficiency in the product, but to the natural deficiency children have in their knowledge of consumer products.

In any event, no Illinois court authorizes an expansion of the consumer contemplation test to the realm of foreseeable users. Rather, Illinois courts, as well as the Restatement, confine the test to the ordinary consumer. It works an absurdity to abandon the ordinary consumer standard for the foreseeable user standard, especially where children are concerned. Children lack knowledge about consumer products. Therefore, children should not be the standard to measure consumer expectations. In the case presently before the court, the ordinary consumer—if not a four-year-old child—is deemed to expect that lighters cause fires. Therefore, lighters are not unreasonably dangerous.[5]

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[5] To contemplate anything, one must be able to reason. Anyone who has reached the age of reason knows the danger of playing with fire. No reasonable person would act the way Cori Smith did. But four-year-olds predate the age of reason. Cori obviously did not contemplate the dangerous consequences of the fire she created.

2. Risk-Utility Test.

Under the Restatement, the consumer contemplation test was the only standard authorized to determine whether a product was unreasonably dangerous. But tort commentators soon began to express dissatisfaction with the test's restrictions on manufacturer liability. These criticisms evolved into case law. *See Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972), and *Barker v. Lull Engineering Co., Inc.*, 573 P.2d 443 (1978), and articles cited therein. The California Supreme Court, which earlier had pioneered the movement away from traditional liability based on contract and negligence, to a theory of strict products liability, *see Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), generated a new test—the risk-utility test—to be used in defective design cases. This innovation began in *Cronin* and culminated in *Barker*, where the court squarely confronted what it perceived as the limitations of the consumer contemplation test.

Barker involved a construction worker who was seriously injured when the lift truck he was operating became unbalanced on a steep grade, and dropped the lumber it was carrying. The worker jumped out of the cab of the truck when it started to tip. Unfortunately, he jumped directly into the path of the falling lumber. He sued the truck manufacturer claiming, among other things, that the truck should have been equipped with "outriggers"—large mechanical arms extending from the sides of the machine—to provide stability on steep grades. The manufacturer responded that the truck was not meant for steep terrain—that cranes and not lift trucks were designed to be used on steep terrain.

At the trial, the court instructed the jury under the consumer contemplation test, and the jury returned a verdict for the manufacturer. Essentially, the jury found that the ordinary consumer would expect the lift truck to tip on steep terrain. The California Supreme Court reversed, on the ground that the consumer contemplation test represented "undue restriction on the application of strict

liability principles." *Barker*, 573 P.2d at 451. The court explained that "[i]n *Cronin* . . . we flatly rejected the suggestion that recovery in a products liability action should be permitted *only* if a product is more dangerous than contemplated by the average consumer, refusing to permit the low esteem in which the public might hold a dangerous product to diminish the manufacturer's liability for injuries caused by the product." *Id.* To deal with this perceived inadequacy, the court fashioned a second test to gauge a manufacturer's liability for designing a defective product. The court specifically held that "a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefit of such design." *Id.* at 454. By introducing this element of hindsight into the strict liability equation, the so-called risk-utility test fundamentally changed that equation. Under the new test, juries would no longer be asked merely to view the foresight of the ordinary consumer. Instead, juries would be asked, in hindsight, to weigh the risk inherent in the product's design.[6]

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[6] This type of hindsight analysis of the manufacturer's design decision has all of the earmarks of determining negligence. Dean Prosser reported it as such in the fourth edition of the *Law of Torts*, where he discussed liability grounded upon the risks inherent in a product's design. He concluded that "even though [this type of liability] may occasionally be called strict, [it] appears to rest primarily upon the proper standard of care, so that the tort essentially is a matter of negligence." William L. Prosser, *Law of Torts*, 644 (4th ed. 1971). The California Supreme Court attempted to avoid this association with negligence, however, by focusing the test on the product instead of the manufacturer's design decisions: "the jury's focus is properly directed to the condition of the product itself, and not to the reasonableness of the manufacturer's conduct." *Barker*, 573 P.2d at 457. The fifth edition of the widely used *Law of Torts*, which was published after Dean Prosser's death, and renamed *Prosser and Keeton on Torts*, places the risk-utility test squarely in the category of strict liability rather than negligence. W. Page Keeton, *Prosser and Keeton on Torts*, 699-700 (5th ed. 1984).

The California Supreme Court decided *Barker* on January 16, 1978. The case did not gain immediate acceptance in other jurisdictions. It represented a significant expansion upon the Restatement approach, which itself was a significant expansion upon traditional contract and tort law.[7] Within a year after *Barker* was decided, the Illinois Supreme Court continued to cling exclusively to the Restatement approach, declaring in a decision on December 4, 1978 that "[a]n action is not maintainable in products liability merely because the design used was not the safest possible." *Hunt*, 384 N.E.2d at 372. But within two months the court seemed to change course. In *Anderson v. Hyster Co.*, 385 N.E.2d 690, 692 (Ill. 1979), the court declared, without citation, that a design defect may be proved "by evidence of the availability and feasibility of alternative designs at the time of its manufacture, or that the design used did not conform with the design standard of the industry, design guidelines provided by authoritative voluntary association or design criteria set by legislation or governmental regulations." Later Illinois cases which have applied variations of the risk-utility test have cited *Anderson* and *Barker* as authority for the test. *See Lamkin*, 563 N.E.2d at 457; *Palmer v. Avco Distributing Corp.*, 412 N.E.2d 959, 963 (Ill. 1980); *Kerns v. Engelke*, 390 N.E.2d 859, 864 (Ill. 1979).

Thus did the risk-utility test gain root in Illinois strict products liability law. How deeply it is rooted remains another question. True, the Illinois Supreme Court has sanctioned variations of the test, in certain cases, to determine whether a product is unreasonably dangerous. *See, e.g., Lamkin*, 563 N.E.2d at 457; *Palmer*, 412 N.E.2d at 964; *Kerns*, 390 N.E.2d at 865; and *Anderson*, 385 N.E.2d at 692. But in other cases, the court has summarily de-

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[7] For an insightful discussion concerning the expansion in strict products liability law brought about by allowing a jury to assess the inherent risk and utility of a product's design, *see* Judge Easterbrook's concurring opinion in *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-18 (7th Cir. 1990).

termined that certain products simply are not unreasonably dangerous, without reference to the test. *See West v. Deere & Co.*, 582 N.E.2d 685, 686-87 (Ill. 1991); *Dubin v. Michael Reese Hospital*, 415 N.E.2d 350, 352 (Ill. 1980); *Hunt*, 384 N.E.2d at 372. The idea that the test is a sweeping pronouncement of strict products liability law, meant to apply to all products, comes from some broad language in *Lamkin*, where the court stated: "[a] plaintiff may demonstrate that a product is defective in design, so as to subject a retailer and a manufacturer to strict liability for resulting injuries, in one of two ways: (1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs." *Lamkin*, 563 N.E.2d at 457.

Does this pronouncement require that we mechanically apply the risk-utility test to all design defect claims, or may we—as the Illinois Supreme Court has done on occasion—summarily determine that a product is not defective? In *Scoby v. Vulcan-Hart Corp.*, 569 N.E.2d 1147 (Ill. App. 1991), an Illinois Appellate Court grappled with this question in a case similar to this one, and its decision is instructive. There, the plaintiff sued a deep fat fryer manufacturer for burns he sustained when he slipped at work and his arm became submerged in the hot oil contained in the fryer. He argued that the fryer should have had a simple cover, which the parties agreed would have prevented the injury. The trial court granted summary judgment for the fryer manufacturer and the appellate court affirmed, determining that the fryer without a cover was not unreasonably dangerous. The appellate court considered whether *Lamkin*'s broad authorization of the risk-utility test (the appellate court called this the danger-utility test), meant that the test should be applied in all cases. The court determined that in certain cases, the risk-utility test should not be applied, stating:

> We do not deem *Lamkin* or other cases applying aspects of the danger-utility test intend that all manufacturers of products . . . should be subject to liability depending on the trier of fact's balancing under that test, when suit is brought by one injured by such a product. Somewhere, a line must be drawn beyond which the danger-utility test cannot be applied. Considering not only the obvious nature of the danger here but, also, the simple nature of the mechanism involved, we conclude that the circuit court properly applied only the consumer-user contemplation test. Under that test, summary judgment for the defendant was clearly proper.

Scoby, 569 N.E.2d at 1151.

The court in *Scoby* alluded to the absurdity of applying the risk-utility test to simple but obviously dangerous products. Consider, as the defendant in *Scoby* proposed, the ordinary kitchen knife. Suppose someone cut by such a knife sued its manufacturer for failing to design a permanent retractable sheath for the knife. Should that person be able to avoid summary judgment simply by presenting statistics showing the feasibility of a permanent retractable sheath? The logical answer is no. As the court in *Scoby* recognized "many manufactured products have potential to cause substantial injury and most can be made safer by different design." *Scoby*, 569 N.E.2d at 1151. For certain products, at least, the manufacturer should not be subject to liability just because it failed to choose the safest (and probably more expensive) alternative design.

So how then do we read the broad statement in *Lamkin*? Really, the statement says nothing more than Illinois authorizes the risk-utility test in products liability cases. The statement does not address whether this authorization extends to simple but obviously dangerous products. To the extent that one might read the statement as covering simple but obviously dangerous products, the statement is mere dictum. Indeed, *Lamkin* had nothing to do with such products; therefore, whether or not the risk-utility test is appropriate for such products was not a

question presented to the court. If the court answered that question—as those who would apply the risk-utility test to this case suggest—the answer was "not addressed to the outcome of the . . . case and therefore perhaps not as fully considered as it would have been if essential to the outcome." *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988). In *Northwestern Nat. Ins. Co. v. Maggio*, 976 F.2d 320, 323 (7th Cir. 1992), we discussed the force we should give to state supreme court dicta in a diversity case:

> Judicial opinions are frequently drafted in haste, with imperfect foresight, and without due regard for the possibility that words or phrases or sentences may be taken out of context and treated as doctrines. We shouldn't like this done to our opinions and are therefore reluctant to do it to the opinions of other courts. No court, even a federal court in a diversity suit, is obliged to treat a dictum of another court (or, for that matter, its own dicta) as binding precedent.

No Illinois court has applied the risk-utility test to a simple but obviously dangerous product. We need not expand upon the Illinois Supreme Court's already broad statement in *Lamkin*, and apply the test to such a product. If the question before us was, simply, "Does Illinois authorize the risk-utility test to determine whether a product is unreasonably dangerous?" the answer would be clear. Certainly, the Illinois Supreme Court has authorized use of the test in some cases. But the question before us is slightly different: "Does Illinois authorize use of the risk-utility test for a simple product which poses an obvious danger?" The answer to this question is not so clear. The Illinois Supreme Court has never applied the test to such a product. An intermediate appellate court has determined that it never will. *Scoby*, 569 N.E.2d at 1151. Our task in a diversity case is to predict what the state's highest court would do if presented with the same issue. *See Heller*, 974 F.2d at 858; *see also* Wright, Miller and Cooper, § 4507 at 94 ("If a state's highest court has not ruled on an issue, intermediate appellate court decisions constitute

the next best indicia of what state law is.").[8] Based on our examination of past and current Illinois case law, we agree with the appellate court which decided *Scoby*, that the Illinois Supreme Court would not apply the risk-utility test to simple but obviously dangerous products. *Accord Mason v. Ashland Exploration, Inc.*, 965 F.2d 1421, 1428 (7th Cir. 1992) (treating *Scoby* as authoritative reading of *Lamkin*).

In summary, whether Illinois authorizes use of the risk-utility test is not disputed; clearly it does. *See Lamkin*, 563 N.E.2d at 457. Whether this authorization requires that courts apply the test to all products liability cases is a point of contention. *See Scoby*, 569 N.E.2d at 1151. When given a choice between an interpretation of Illinois law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path (at least until the Illinois Supreme Court tells us differently). The dictum in *Lamkin* notwithstanding, we may assume, as an Illinois appellate court has done, that the Illinois Supreme Court would not apply the risk-utility test to a simple but obviously dangerous product. An ordinary disposable lighter is such a product. Therefore, the district court was correct to determine that such a lighter is obviously dangerous, but not unreasonably dangerous, without reference to the risk-utility test.

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[8] Nothing in the history of the risk-utility test supports the proposition that it was meant to apply to all products. In *Barker*, where the California Supreme Court essentially created the test and originally applied it, the court stated that legal tests in the area of products liability should be "appropriate to the circumstances of a particular case, to guide the jury as to the standard to be applied in determining whether a product is defective or not." *Barker*, 573 P.2d at 452. That court did not address whether the risk-utility test is appropriate in cases of simple but obviously dangerous products.

B. Other Issues

Two final issues remain for our consideration. First, Todd has appealed the district court's decision to grant summary judgment for Bic on his negligence claim. In his complaint, Todd claimed that Bic was negligent for breaching its duty to manufacture a safe lighter. It is true that manufacturers have a legal duty, under Illinois negligence and strict products liability law, to produce reasonably safe products. *Coney*, 454 N.E.2d at 203. If the manufacturer breaches this duty, it is strictly liable; if the manufacturer breaches this duty because it failed to employ the requisite degree of care, it is also negligent. *Id.*; *see also Phillips v. United States Waco Corp.*, 516 N.E.2d 670, 674 (Ill. App. 1987) ("the breach of duty is the same in both a negligence and a strict products liability claim, but the key distinction between a negligence claim and a strict liability claim lies in the fault concept.") We have already determined that the lighter in question was not unreasonably dangerous. It follows that Bic did not breach its duty to produce a reasonably safe product.

Secondly, in his appellate brief, Todd claimed that the warning Bic placed on the lighter was insufficient, and that the insufficiency made the lighter unreasonably dangerous. In the course of certifying this case to the Illinois Supreme Court, however, we decided the warning issue. We agreed with the district court that the warning Bic placed on the lighter was adequate as a matter of law. *See Todd*, 9 F.3d at 1219 ("Bic accordingly is entitled to summary judgment on the warning branch of this case.") We incorporate the sum and substance of that decision into this opinion. Certainly, the plain admonition "KEEP OUT OF REACH OF CHILDREN" provided adequate warning that the cigarette lighter should have been kept out of the reach of four-year-old Cori Smith.

III. Conclusion

The district court was correct in its conclusion that, as a matter of law, an ordinary disposable cigarette lighter is not unreasonably dangerous. Because Bic did not produce an unreasonably dangerous product, it was neither strictly liable nor negligent. Therefore, the judgment of the district court is

AFFIRMED.

CUMMINGS, *Circuit Judge*, dissenting. I dissent for the reasons expressed by Judge Kaufman in his majority opinion in *Todd v. Societe Bic*, 991 F.2d 1334 (1993), and by Judge Flaum in his dissent herein.

CUDAHY, *Circuit Judge*, dissenting. I join Judge Flaum's dissenting opinion. And, while I have the highest regard for my colleagues who may see the matter differently, I certainly agree with Judge Ripple that this question of Illinois products liability law has occupied a disproportionate share of this court's attention. This is, after all, a diversity case. And so far as I can recall during my tenure here, this is the first such case to receive en banc review. Nonetheless, and despite Judge Ripple's cogent arguments to the contrary, I suppose one bad turn deserves another. Having descended this far and at this cost into the morass, we might as well finish the job and put one more opinion of dubious authority in the books.

In my view as a federal observer of a state process, Judge Ripple's concurring opinion when we first visited this matter, *see Todd v. Societe Bic, S.A.*, 9 F.3d 1216, 1224 (7th Cir. 1993) (Ripple, J., concurring), along with Judge Flaum's opinion today, successfully demonstrate why the foreseeable user standard and the risk-utility test

may properly apply here on the basis of the relevant Illinois cases. With respect to the foreseeable user standard, the majority goes to some pains to show the "absurdity" of using the knowledge and expectation of children as a measure of the "unreasonable dangerousness" of the product. Since children are unknowledgeable about danger, says the majority, and innocent of the ways of causation, they would contemplate little if any danger in almost any product. This would result in virtually absolute liability for the use or misuse of products by children. But the fact is that, in the case of products like lighters and knives, injury to some children is perhaps inevitable. The issue ought to be what party is best able to bear and distribute the cost of this inevitable injury—the child or the manufacturer. While the majority points to Illinois cases that suggest that it does not intend to make the manufacturer an insurer against injuries that result from the use of its product, Maj. Op. at 6-7, cases like *Doser v. Savage Mfg. & Sales Inc.*, 568 N.E.2d 814 (Ill. 1990), and *Lamkin v. Towner*, 563 N.E.2d 449 (Ill. 1990), appear to point the other way. It is not clear to me whether employing a regime of tort law is preferable to requiring potential victims (or their parents) to go into the marketplace and buy insurance to guard against the cost of unavoidable accidents. While this question, in my view, should drive the policy analysis, our duty is not so much to evaluate policy as simply to predict (or guess at) the course of the Illinois courts.

With respect to the risk-utility test, again I am not sure that it is "absurd" to apply this measure to simple but obviously dangerous products like lighters and knives. Again, injury seems inevitable and the issue is whether it is properly part of the cost of manufacture or better borne by the victim. The point of strict products liability, after all, is "to minimize the costs of accidents and to consider who should bear those costs." Note, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 Colum. L. Rev. 2045, 2049-50 (1984) (quoting *Suter v. San Angelo Foundry & Mach. Co.*, 406

A.2d 140, 151 (N.J. 1979)). Perhaps it is patronizing to deny consumers the opportunity to purchase "riskier" products at a lower price. This is not our choice to make, but I see nothing irrational in Illinois' choosing the course it thinks most sensible and socially appropriate. I therefore respectfully dissent.

FLAUM, *Circuit Judge*, with whom CUMMINGS, CUDAHY and ROVNER, *Circuit Judges* join, dissenting. I cannot accept the court's judgment and opinion. Our charge here is not to determine the best, most logical, or even the most efficient product-liability rules for the state of Illinois. If it were, I would be joining the court's persuasive opinion. However, Article III of the Constitution only affords us the power to ascertain the law of Illinois and apply it to the litigants before us as if we were an inferior state court. Because I remain convinced that the law of Illinois required the federal district court to apply the risk-utility doctrine in this product liability case, I conclude that our inquiry in this case should go no further.

When this court sits in diversity, federalism requires us to enforce the substantive law of the forum state, even when we conclude we see a more enlightened path. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . [a]nd whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."); *see also Guaranty Trust v. York*, 326 U.S. 99, 110 (1945) ("*Erie R. Co. v. Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties."), *overruled* on other grounds by *Hanna v. Plumer*, 380 U.S. 460 (1965). Federalism proscribes unwarranted federal judicial meddling

in state matters because such interference would "prevent the informed evolution of state policy by state tribunals." *Moore v. Sims*, 442 U.S. 415, 429-30 (1979), citing *Trainor v. Hernandez*, 431 U.S. 434, 445 (1977).

While I appreciate the sound and persuasive policy reasons for limiting access to a risk-utility jury test when a plaintiff has freely undertaken to use a product with obvious risks, the Illinois Supreme Court, in cases such as *Lamkin*, 138 Ill. 2d at 528, 563 N.E.2d at 457, and *Doser*, 142 Ill. 2d at 197-98, 568 N.E.2d at 824, appears to disagree. In *Lamkin*, the Illinois Court defined a defective product as one that fails the risk-utility test. *See Lamkin*, 138 Ill. 2d at 528, 563 N.E.2d at 457. In *Doser*, the Illinois Court confirmed the appropriateness of the risk-utility test for products with patent dangers. 142 Ill. 2d 176, 568 N.E.2d at 819. When analyzing unreasonably dangerous products in Illinois, "[t]he balancing of the likelihood and gravity of harm must be weighted against the burden of the precaution which would be effective to avoid the harm." *Id.*, citing *Burke v. Illinois Power Co.*, 57 Ill. App. 3d 498, 511, 373 N.E.2d 1354, 1367 (1st Dist. 1973). As the Illinois Supreme Court explained, in Illinois, "[w]hether a product is unreasonably dangerous for failure to incorporate safety devices is ordinarily a question of fact which the jury should resolve." *Doser*, 142 Ill. 2d 176, 568 N.E.2d at 820 & 824.

Neither *Lamkin* nor *Doser* hint at any limitation of the risk-utility doctrine in Illinois. While *Scoby*, a decision from the Illinois Fourth District Appellate Court, may have rejected the risk-utility test as a means of analyzing whether lid-covers are required on cooking pots,[1] 211

[1] A close reading of *Scoby* suggests that the Illinois appellate court may have actually conducted its own risk-utility test and concluded that a reasonable jury could never have found any economically feasible improvements to a cooking pot given the measured amount of risk. *See Scoby*, 211 Ill. App. 3d 106, 569 N.E.2d 1147,

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Ill. App. 3d 106, 569 N.E.2d 1147, 1151 (1991), *Scoby* cannot in any way constrain *Lamkin* and *Doser*. In a hierarchical judiciary, judges of inferior courts may not limit decisions of superior courts, despite their desire to improve the law. *See Gacy v. Welborn*, 994 F.2d 305, 310 (7th Cir. 1993). It is a "fundamental principle of judicial construction that the lower judicial tribunals in Illinois are bound by decisions of the Illinois Supreme Court, and it is the duty of such tribunals to follow those decisions in similar cases." *Greenlee v. Shedd Aquarium*, 36 Ill. App. 3d 924, 925, 344 N.E.2d 788, 790 (1st Dist. 1976) citing *Agricultural Transp. Ass'n. v. Carpentier*, 2 Ill. 2d 19, 116 N.E.2d 863 (1953). Definitive pronouncements of the State's Supreme Court, such as *Lamkin* and *Doser*, are binding upon inferior courts applying State law, "contrary [Illinois] appellate court decisions notwithstanding." *Green-*

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[1] *continued*

1151. Perhaps *Scoby* reaches the correct result notwithstanding its reasoning.

Scoby tries to illustrate its risk-utility analysis with the point that economics will never force ordinary kitchen knives, with their obvious danger, to have retractable sheaths. However, ten years ago the same might well have been said about the ordinary intravenous medical syringes which were then considered generally unimprovable. Today, because of new circumstances, a panoply of innovative designs, including a retractable sheath, have been provided by the market to protect health care workers from needle sticks.

Classical economic theory teaches that a market is the place for consumers to choose, according to their own information, the appropriate level of safety innovation in their products. Accordingly, the courts, lacking the information consumers have about their own individual circumstances, would be ill-suited for making such safety choices. Any judicially imposed risk-utility tests should be carefully reserved for those rare instances when transaction costs cause the market to fail to provide consumers any meaningful exchange with producers. However, the issue before this court is not economics, but the law in Illinois. My read of Illinois Supreme Court case law suggests that such economic theories are not reflected in its case law.

lee, 36 Ill. App. 3d at 925, 344 N.E.2d at 790. Whatever the preferences of this court, the Illinois Supreme Court's adoption of the risk-utility doctrine should not be refashioned by the interpretive prowess of this tribunal. Thus, I stand by my initial read of Illinois Supreme Court precedent, that Illinois' law appears to require a risk-utility analysis in product liability cases, and therefore I dissent.

RIPPLE, *Circuit Judge*, dissenting. I doubt that few, if any, cases that have been decided during recent years have consumed the number of judge-hours that this case has cost this court. After full consideration by a panel of judges, full en banc consideration by the entire court, an attempt at certification, and the drafting and full consideration of a second en banc opinion, we remain divided on the content of Illinois law as well as the appropriate application of that law to the facts of this case. Today's decision resolves the litigation before us, but the bench and bar are provided with a decision that, as a practical matter, does nothing to clarify the law and therefore expedite the course of later litigation. Indeed, all that is decided is that an ordinary disposable cigarette lighter is such an obviously dangerous product that, when district courts of this circuit are confronted with such a case again, they ought not apply the risk utility test. I assume that the court's decision implicitly permits a different result even in that case if, in the interim, the courts of Illinois indicate that they would reach the contrary result. This minimal yield from such a significant effort on the part of so many judges ought to induce a great deal of reflection and a careful self-examination of our use of en banc procedures.[1]

[1] The majority opinion takes the rather unconventional step of disclosing the vote of the court on the petition for rehearing en

(Footnote continued on following page)

Courts of appeals have wide latitude in determining whether to hear a case en banc. The Federal Rules of Appellate Procedure provide some, but minimal, assistance in this regard. Rule 35(a) provides in pertinent part:

> (a) *When Hearing or Rehearing In Banc Will be Ordered.* A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

When the court decides to devote its time to hearing a case en banc, it is determining that such a significant investment of time and energy is necessary to accomplish legitimate jurisprudential goals beyond decision in the individual case. Such "legitimate jurisprudential goals" in-

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[1] *continued*

banc in order to suggest that there is an inconsistency in the position that I have taken in the disposition of this appeal. My position *has* changed in the course of this appeal. Indeed, that is the whole point of this separate opinion. As I have noted in the text, the difficulties the court has experienced in deciding this matter have convinced me that the course upon which we originally embarked is not a prudent one and that we ought to accept that reality and vacate the en banc order as having been improvidently entered. It is for this reason that, in urging my colleagues to adopt the path I have suggested here, I have employed the first person plural.

Accordingly, it is not accurate for the majority to say simply that I am critical of the decision to take the case en banc; I am critical of the decision to continue to expend judicial resources on the matter when it has become clear that such a course will accomplish so very little and sanction a judicial methodology that has a very undesirable impact on the ability of the states to control the development of their law and on the accuracy of the law that we establish as precedent for the district courts of this circuit.

clude, as our rules note, the resolution of conflicts between this circuit and other courts of appeals. It also includes the resolution of novel and important issues of federal law and recurring procedural issues of enduring importance to the administration of justice in the federal courts. On the other hand, few would maintain that "legitimate jurisprudential goals" include forsaking the normal course of common law adjudication in order to impose ideological discipline on fellow federal judges. Nor do such legitimate goals include attempting to set the vectors for the future course of state law development, a prerogative left by the Constitution to the state courts.

The adjudication of diversity cases affords little opportunity for the accomplishment of the legitimate goals of an en banc proceeding. Indeed, beyond rendering a decision in the particular case at hand, little of enduring value can be accomplished by hearing a diversity case en banc. In any diversity case, this court's decision has no precedential effect on the state courts. *Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1395 (7th Cir. 1992) ("State courts are not bound by federal courts' interpretations of state law."); *Cohn v. Checker Motors Corp.*, 599 N.E.2d 1112, 1117 (Ill. App. 1992) (stating that Illinois courts have no obligation to follow decisions of federal courts interpreting state law). While the decision is binding on the federal trial courts—at least as long as the decision's underpinnings are left intact by subsequent state court activity—it is rarely possible, given the difficulty[2]

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[2] Chief Judge Sloviter of the Third Circuit has recently described succinctly this difficulty:

> Finding the applicable state law, however, is a search that often proves elusive. Difficulty arises when the federal courts must predict how the highest court of the state would decide the issue. Even when there is a state supreme court decision on point, the direction is not always crystal clear. For example, the allegedly controlling decision of the state supreme court may be old and intervening doctrinal trends may call into question whether the state supreme court would follow it today.

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in making "*Erie* Guesses,"[3] to provide, in any principled fashion, a great deal of meaningful guidance for the resolution of future cases. Moreover, federal court pronouncements on the content of state law inherently involve a significant intrusion on the prerogative of the state courts to control that development. As Chief Judge Jon Newman of the Second Circuit has pointed out, federal court pronouncements on state law in the exercise of its responsibilities under the *Erie* doctrine have the potential of disrupting the normal pattern of development of state law. "One distinct shortcoming of diversity jurisdiction is the interruption of the orderly development and authoritative exposition of state law occasioned by sporadic federal court adjudications." *Factors Etc., Inc. v. Pro Arts Inc.*, 652

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[2] *continued*

Further, the relevant language in the state supreme court's decision may be merely dictum, or the pertinent holding may have been joined by less than a majority of that court.

More significant difficulties arise when the state supreme court has not directly addressed an issue. As the late Judge Henry Friendly noted, "[w]hereas the highest court of the state can 'quite acceptably ride along a crest of common sense, avoiding the extensive citation of authority,' a federal court often must exhaustively dissect each piece of evidence thought to cast light on what the highest state court would ultimately decide." What weight should a federal court give decisions of intermediate state courts? Of what consequence are inconsistencies in the state court decisions? What if there is "persuasive data" that the state supreme court would decide differently than the intermediate court?

Finally, the most difficult problems arise when there are not state court decisions on point. The court on which I sit has said that when we must predict state law in such situations, we should turn to "analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue."

Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1675-77 (1992) (citations and footnotes omitted).

[3] *Id.* at 1679.

F.2d 278, 282 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). When the federal court's "*Erie* Guess" is wrong, the resulting impact on state law developments is, of course, especially significant. As Chief Judge Sloviter has written:

> Until corrected by the state supreme court, such incorrect predictions inevitably skew the decisions of persons and businesses who rely on them and inequitably affect the losing federal litigant who cannot appeal the decision to the state's supreme court; they may even mislead lower state courts that may be inclined to accept federal predictions as applicable precedent.

Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1681 (1992).

All of these limitations and dangers in the adjudication of diversity cases are magnified when the court decides to hear such a matter en banc. As noted earlier, by their nature, en banc proceedings are intended to decide more than the case before the court and to marshall the intellectual and moral authority of the entire court on the issue presented. Yet, these goals are, in the context of the diversity case, frustrated ab initio. Whatever the court's decision, it can have no binding authority on the state courts and, in future cases, lower federal courts must still take into consideration subsequent state caselaw developments. An erroneous decision by the en banc court—or its gratuitous comment on what state law ought to be—is a particularly unwarranted intrusion into the prerogative of the state to control the development of its own law.

These considerations counsel that en banc adjudication in diversity cases ought to be undertaken only in the most unusual circumstances. The circumstances surrounding this litigation certainly make the exercise of our en banc authority questionable. We have labored greatly and produced a decision that does little, if anything, to promote a legitimate goal of an en banc proceeding. The result is no doubt pleasing, from an ideological point of view,

to the majority of the court and it can now impose that ideological position, at least temporarily, on the district courts. Yet, whether the majority has interpreted properly Illinois law remains, at best, a rather weak "*Erie* Guess." The imprudence of the course chosen by the court is, in my view, particularly underlined by the fact that it appears that BIC's concession in the district court that the child was a foreseeable user creates a genuine issue of triable fact with respect to the consumer contemplation test. *See Doser v. Savage Mfg. & Sales, Inc.*, 568 N.E.2d 814, 824 (Ill. 1990).[4] The court's expounding on the risk utility test is therefore unnecessary and a significant intrusion into the prerogatives of the state. Accordingly, I would vacate the order granting rehearing en banc as having been improvidently entered.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[4] As noted in my separate opinion in the court's first effort in this case, in the absence of any further guidance from the Supreme Court of Illinois, we are obliged to follow its latest pronouncement. *See Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1224 (7th Cir. 1993) (Ripple, J., concurring). As set forth in more detail in my earlier opinion, *Doser* makes it clear that foreseeability is an element in determining whether a product is unreasonably dangerous. *Id.*

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—4-12-94

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60603
May 26, 1994

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETYH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ILANA D. ROVNER, Circuit Judge

RODNEY TODD, as Special Administrator of the Estate of TIFFANY TODD, a deceased minor,	)	Appeal for the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiff-Appellant,	)	
No. 92-1201 v.	)	
SOCIETE BIC, a foreign corporation, BIC CORPORATION, a foreign corporation, and BIC PEN CORPORATION, a foreign corporation,	)	**No.** 90 C 5487
	)	**Ann Claire Williams,** Judge.
Defendants-Appellees.	)	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Plaintiff-Appellant, no judge in active service has requested a vote thereon, and all of the judges on the en banc panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

In the
United States Court of Appeals
For the Seventh Circuit

No. 92-1201

RODNEY TODD, as Special Administrator
of the Estate of Tiffany Todd,

Plaintiff-Appellant,

v.

SOCIETE BIC, S.A., and BIC CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 5487—**Ann Claire Williams**, *Judge.*

ARGUED SEPTEMBER 8, 1993—DECIDED NOVEMBER 12, 1993

Before POSNER, *Chief Judge*, and CUMMINGS, BAUER, CUDAHY, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* In March 1988 Cori Smith, then four years old, picked up a cigarette lighter and set a small fire in her parents' bedroom. She was admonished not to play with lighters or matches—of which the household had many, because all four adults smoked cigarettes. About a week later Cori found a BIC lighter on a table in the living room. Cori used the lighter to set ablaze some papers in the bedroom where Tiffany Todd, then 23 months old, was sleeping. Tiffany died in the conflagration; the

adults and the five other children in the household survived. Tiffany's father Rodney, as special administrator of her estate, filed this diversity action seeking damages from the lighter's manufacturer. The parties agree that Illinois, where the fire occurred, supplies the governing law.

Plaintiff has two principal theories: that BIC should have warned customers about the risks lighters pose to households with children, and that BIC should have designed its lighters to resist children's efforts to use them. Failure to choose the right design or give proper warnings made the lighter defective or unreasonably dangerous, in either case leading to liability in tort. BIC moved for summary judgment. It conceded that misuse of lighters by children is foreseeable and that it is possible to make child-resistant lighters at some cost in both money and inconvenience to adult users. In 1992 BIC began selling a child-resistant lighter, and the Consumer Product Safety Commission has directed all other manufacturers to follow suit. 16 C.F.R. Part 1210 (effective July 1, 1994), 58 Fed. Reg. 37557, 37584-91 (July 12, 1993). BIC contended, however, that it gave sufficient warnings and that Illinois does not require manufacturers to make their products child-resistant when parents may take effective precautions. The district court granted BIC's motion and dismissed the suit. 1992 U.S. Dist. LEXIS 88 (N.D. Ill.). A divided panel of this court reversed, concluding that a trial is necessary on each of plaintiff's theories. 991 F.2d 1334 (1993). Concern about the implications of the panel's reasoning led the full court to vacate the panel's decision and set the case for hearing in banc. 991 F.2d 1344 (1993).

I

That fire attracts youngsters—and that cigarette lighters in the hands of children can lead to calamity—no one doubts. According to the CPSC, "for the period 1988-90, these fires [set by children under 5 playing with lighters] caused an annual average of 150 deaths, approximately 1,100 injuries, and nearly $70 million in property damages." 58

Fed. Reg. at 37564. BIC recognized this danger, and its lighters were emblazoned: "KEEP OUT OF REACH OF CHILDREN". Plaintiff deems this warning insufficient because BIC did not tell parents that children between three and five are attracted to flame, able and eager to open closets, cabinets, and purses in order to inspect their contents, and unable to follow instructions not to fiddle with what they find there.

Parents who followed BIC's advice to keep their lighters out of the reach of children did not need separate admonition about youngsters' inability to follow directions. Households are full of potentially dangerous items, including knives, matches, and drugs, that are bound to cause injury in inexperienced hands. BIC told owners to make access *physically* impossible, not to issue instructions to the children. Had the adults in this household followed the warning, there would not have been a fire.

Manufacturers could of course provide secondary warnings about the consequences of not following primary warnings. BIC could have written something like: "Keep this lighter out of the reach of children, and be aware that children not only are resourceful in finding things but also are apt to disobey your instructions not to play with lighters they can get their hands on." It could have amplified this longer warning with data about the number of fires children set with lighters, in order to impress on parents the importance of following the primary warning to make the lighters inaccessible (or, perhaps, to induce the parents to quit smoking). Extended warnings present several difficulties, first among them that, the more text must be squeezed onto the product, the smaller the type, and the less likely is the consumer to read or remember any of it. Only pithy and bold warnings can be effective. Long passages in capital letters are next to illegible, and long passages in lower case letters are treated as boilerplate. Plaintiff wants a warning in such detail that a magnifying glass would be necessary to read it. Many consumers cannot follow simple instructions (including pictures) describing how to program their video cassette recorders. To be more than a

scare tactic, the warning could not stop with the number of fires and deaths. It would have to include the number of lighters sold to households with small children (so that the buyer could determine the risk per lighter) and the number of fires that children set with matches (so that the buyer could evaluate whether it is safer to switch). These numbers are abstract. For a parent determined to smoke, the right question is what to *do*. BIC provided that information.

There is a further practical inquiry: will consumers who disdain a bold and (if followed) effective warning be influenced by smaller and more subtle points? If parents leave lighters on living room tables despite "KEEP OUT OF REACH OF CHILDREN", and despite knowing that lighters cause fire (which is why the adults bought them), is a recitation of the CPSC's data likely to alter their conduct? These adults did not heed the Surgeon General's dire warnings, prominent on every package of cigarettes, about the hazards of smoking. They exposed their children to tobacco smoke, which causes more harm than does playing with lighters. Environmental Protection Agency, *Respiratory Health Effects of Passive Smoking* (1992). Would a screed on their lighters based on the CPSC's data about fires succeed where concise advice failed? Extended advice, reducing the likelihood that parents will notice and follow the principal warning, is particularly ill-advised when the additional information is already well known. What parent is unaware that children between the ages of three and five explore and test their surroundings even when told not to? Can it be that only a warning by BIC Corporation will alert parents that kids are at least as successful as cats in getting into cabinets and other hiding places, and that children have minds of their own? Illinois does not require manufacturers to warn consumers about facts they already know, and it does not require manufacturers to dilute the principal warnings with distracting information. *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 466, 343 N.E.2d 465, 471 (1976); *Riordan v. International Armament Corp.*, 132 Ill. App. 3d 642, 648, 477 N.E.2d 1293, 1297 (1st Dist. 1985).

Plaintiff's warning theory encounters an additional problem: causation. Rodney Todd and the three other adults in the household had received the most vivid warning imaginable: Cori had started a fire with a cigarette lighter only a week earlier. What words could be more potent than this incident? The household knew about both the risk of fire and about Cori's proclivity and ability. All four adults conceded this during their depositions, adding that they appreciated the hazard even before Cori set her first fire. It is inconceivable that adults who left a cigarette lighter within the grasp of a child who had *already* started a fire would have been influenced by any written warning. Cf. *Murphy v. Corey Pump & Supply Co.*, 47 Ill. App. 2d 382, 197 N.E.2d 849 (1st Dist. 1964). BIC accordingly is entitled to summary judgment on the warning branch of the case.

II

Since 1965 Illinois has held manufacturers strictly liable for injuries caused by defective products, following the approach of *Restatement (2d) of Torts* §402A (1965). See *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965). "Strict liability" does not imply that manufacturers insure consumers against injuries associated with the use (or misuse) of their products. Some products are dangerous even when properly designed, and it is both easier and cheaper for consumers to obtain their own insurance against these risks than to supply compensation case-by-case through the judicial system. "Virtually any product is capable of producing injury when put to certain uses or misuses. . . . Injuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product. The injuries must derive from a distinct defect in the product, a defect which subjects those exposed to the product to an unreasonable risk of harm." *Hunt v. Blasius*, 74 Ill. 2d 203, 211-12, 384 N.E.2d 368, 372 (1978).

What, then, does Illinois define as a "defect"? Until recently a state court would have dispatched a case such as ours with the observation that a "dangerous product which bears a warning, and which is safe if the warning is followed, is neither defective nor unreasonably dangerous." *Dugan v. Sears, Roebuck & Co.*, 113 Ill. App. 3d 740, 741, 447 N.E.2d 1055, 1058 (1st Dist. 1983) (citing *Restatement* §402A comments j and k). The BIC lighter would have been safe had the adults kept it out of Cori's reach, as the warning stated. Jurisdictions that have applied §402A to cigarette lighters have concluded on this reasoning that the absence of child-resistant features does not make the lighters defective or unreasonably dangerous. E.g., *Adams v. Perry Furniture Co.*, 497 N.W.2d 514 (Mich. App. 1993); *Griggs v. BIC Corp.*, 981 F.2d 1429, 1431-34 (3d Cir. 1992) (Pennsylvania law); *Byler v. Scripto-Tokai Corp.*, 944 F.2d 904 (6th Cir. 1991) (Kentucky law). But cf. *Bean v. BIC Corp.*, 597 So. 2d 1350 (Alabama 1992) (declining to apply any legal approach to cigarette lighters in advance of discovery).

A case decided in 1990 draws this straightforward approach into question. *Lamkin v. Towner*, 138 Ill. 2d 510, 528, 563 N.E.2d 449, 457 (1990), explains:

> A plaintiff may demonstrate that a product is defective in design, so as to subject a . . . manufacturer to strict liability for resulting injury, in one of two ways: (1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs.

See also *Doser v. Savage Manufacturing & Sales, Inc.*, 142 Ill. 2d 176, 197-98, 568 N.E.2d 814, 824 (1990). Plaintiff invokes both of these methods. It is foreseeable that some lighters will fall into the hands of children, who do not appreciate their risks. Thus plaintiff contends that BIC

is liable under *Lamkin*'s first approach, the "consumer contemplation test." As for the second or "risk-utility test," plaintiff contends that the costs and benefits of adding child-resistant features to lighters are debatable questions that must be submitted to a trier of fact. BIC replies that the consumer contemplation test asks whether the *purchaser* can appreciate the risks and use the product safely—so that the customer may make an intelligent decision whether the benefits of the item outweigh the risks—rather than whether the manufacturer can foresee that non-purchasers will acquire and misuse the product. On any other approach, BIC observes, kitchen knives are defective products because children may cut themselves, aspirin is defective because children may take too many tablets, and so on. According to BIC, the risk-utility test applies only to complex products or the unexpected behavior of simple products. A lighter is not complex, people can understand its actions (and risks), and this lighter performed just as it was supposed to.

Each side has support for its position. Start with consumer contemplation. None of the cases expressly addresses the question whether the "consumer" for this purpose is the purchaser or includes any user (or misuser) the manufacturer can foresee. Plaintiff invokes what he characterizes as the plain language of *Lamkin*. BIC replies that, although the persons injured in that case were children who fell through a screen window, the court asked whether their parents could appreciate the risk rather than whether manufacturers could foresee that children could fall through if not restrained by their parents. *Lamkin* spoke of the ordinary consumer, not the foreseeable user. *Doser* says that the "liability of a manufacturer extends to those individuals to whom injury from an unreasonably dangerous product may be reasonably foreseen" (142 Ill. 2d at 197-98, 568 N.E.2d at 824) but does not tell us whether foreseeable risks to non-purchasers are themselves enough to make the product "unreasonably dangerous."

On the risk-utility front things are no clearer. Once again plaintiff emphasizes the language of the passage in *Lamkin* we have quoted, but judicial opinions should not be confused with statutes. Qualifications often are implied or developed as the judges grapple with additional circumstances. *Scoby v. Vulcan-Hart Corp.*, 211 Ill. App. 3d 106, 569 N.E.2d 1147 (4th Dist. 1991), holds that when the product is simple or the risks easy to appreciate, the consumer contemplation test is the sole measure, emphasizing a portion of *Lamkin* that reiterated the observation in *Hunt* that strict liability is limited to attributes of the product that are hidden or otherwise fall outside consumers' usual expectations. *Scoby* concluded: "We do not deem that *Lamkin* or other cases . . . intend that all manufacturers of products . . . should be subject to liability depending upon a trier of fact's balancing under that test . . . Considering not only the obvious nature of any danger here but, also, the simple nature of the mechanism involved, we conclude that the circuit court properly applied only the consumer-user contemplation test." 211 Ill. App. 3d at 112, 569 N.E.2d at 1151. See also *Mason v. Ashland Exploration, Inc.*, 965 F.2d 1421, 1428 n.8 (7th Cir. 1992) (treating *Scoby* as an authoritative gloss on *Lamkin*); *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-18 (7th Cir. 1990) (concurring opinion) (doubting whether a universal cost-benefit approach to design questions in tort litigation would improve product quality at tolerable cost). Estimating the costs and benefits of a child-resistant design could be quite difficult, with corresponding costs and risks of error.† For his part, plain-

† Both costs and benefits are elusive. The CPSC estimates that child-resistant lighters would cost approximately 15¢ to 20¢ more per unit in the marketplace. 58 Fed. Reg. at 37566. About 678 million lighters are sold in the United States each year. *Id.* at 37563. The CPSC could not estimate total costs because it did not know what would happen to sales at the higher prices (particularly for "specialty" lighters, which sell in smaller quantities and therefore would incur much higher per-unit costs of compliance). Users

(Footnote continued on following page)

tiff emphasizes *Harnischfeger Corp. v. Gleason Crane Rentals, Inc.*, 223 Ill. App. 3d 444, 585 N.E.2d 166 (5th Dist. 1991), which applied the risk-utility test to the design of a crane, even though the danger in question—electrocution from bringing the crane into contact with overhead power lines—was obvious to everyone. *Harnischfeger* concluded that a cost-benefit analysis of the product's design is essential no matter how transparent the risk. BIC insists that *Harnischfeger* is limited to complex products such as cranes, and a few cases suggest such a limitation even while applying the risk-utility test to the product at hand. *Besse v. Deere & Co.*, 237 Ill. App. 2d 497, 500-01, 604 N.E.2d 998, 1001 (3d Dist. 1992) (citing *Scoby* favorably).

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† *continued*

of the lighters will suffer some inconvenience, which also counts as a cost—especially to older users whose fingers may not be strong or nimble enough. The benefits look clear enough: by the CPSC's estimate, the total cost of fires set by children under five playing with lighters is $385 million per year. *Id.* at 37564. At first glance, the benefits easily exceed the costs. But child-resistant lighters will not eliminate the fires. Child-resistant is not child-*proof*; the CPSC estimates that 15% of children will be able to use the lighters notwithstanding the safeguards and will set 30% of the former number of fires. *Id.* at 37564. The cost and inconvenience will lead some adults to switch from lighters to matches, posing fire hazards of their own (which CPSC estimates at one-third of the risk of lighters), or to refillable lighters, which are not covered by the rule. And all child-resistant designs present a subtle risk. Parents who (mistakenly) believe that the products are child-proof are more likely to leave them within youngsters' reach. Instead of having zero ability to play with lighters, formerly out of their grasp, these children now have a 15% chance of being able to set a fire. A false sense of security could be fatal. The introduction of child-resistant medicine bottles actually led to an increase in certain kinds of poisonings as parents relaxed their vigilance. W. Kip Viscusi, *Consumer Behavior and the Safety Effects of Product Safety Regulation*, 28 J.L. & Econ. 527, 537-48 (1985); see also Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. Chi. L. Rev. 407, 417-19 (1990). It is hard to know whether child-resistant lighters will produce the same effect.

When acting under the diversity jurisdiction, a federal court must attempt to decide the case as the highest court of the state supplying the law would do. The disagreement among the appellate courts of Illinois shows the difficulty of doing this. Certification is an alternative to prognostication. See *Lehman Brothers v. Schein*, 416 U.S. 386, 390-91 (1974); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 17A *Federal Practice and Procedure* §4248 (2d ed. 1988). Circuit Rule 52 permits us to certify a question of state law when the answer "will control the outcome" of the case. Rule 20 of the Rules of the Supreme Court of Illinois authorizes that court to answer a certified question when the answer "may be determinative of the said cause".

Most debatable issues of state law that arise in diversity litigation must be resolved in federal court if only because certification of all disputes would overwhelm the capacity of the state's highest court. The federal court may essay an answer, resolving the case without subjecting either the parties or the state to the need for an additional hearing, yet without hampering the state's ability to craft its own law. Sometimes, however, the federal court's answer may have effects independent of its persuasive power. In a case such as ours, for example, any substantial divergence between the federal court's estimate of state law and the state's view of its own law will funnel all similar litigation to federal court. None of the manufacturers or principal importers of cigarette lighters is a citizen of Illinois (indeed, only BIC manufactures any disposable cigarette lighters in the United States, 58 Fed. Reg. at 37565), and the damages in these cases exceed $50,000, so the diversity jurisdiction is always available. If the federal court treats the plaintiff more favorably than the state tribunal would, then the plaintiff always files in federal court; similarly any departure in the manufacturer's favor leads the defendant to remove any suit filed in state court. In either case, the state loses the ability to develop or restate the principles that it believes

should govern the category of cases. Certification then ensures that the law we apply is genuinely *state* law. *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1440-41 (7th Cir. 1988). The panel's analysis had substantial propensity to attract all future cases of this kind into federal court; an error in either direction could do so. Little would be served by substituting the guess of eleven judges for that of three; far better to pose the questions to the only judges who can give definitive answers.

Now that the warning question has been resolved, the consumer contemplation and risk-utility tests have become potentially dispositive, making certification appropriate under both state and federal rules. We respectfully request the Supreme Court of Illinois to answer the following questions:

1. Whether the "consumer" for purposes of the consumer contemplation test includes non-purchasers who the manufacturer should foresee will use or misuse the product.

2. Whether the risk-utility test applies to consumer products whose risks can be appreciated by their intended users.

It may be that when revisiting the state's law of products liability the Justices of the Supreme Court of Illinois will conclude that these are not the right questions. In that event, the Justices should feel free to reformulate the questions, just as they would when dealing with the issues posed in a petition for leave to appeal. It is not our purpose to constrain the state court. The Clerk will transmit the record and briefs in this case to the Supreme Court of Illinois.

FLAUM, *Circuit Judge*, with whom CUDAHY, *Circuit Judge*, joins, concurring. After some pause, I accept this court's judgment and opinion—both affirming the district court's order granting BIC summary judgment on Plaintiff's warning theory, and certifying the "consumer-contemplation" and "risk-utility" questions for resolution by the Illinois Supreme Court. *See* Opinion *ante* parts I & II respectively. While I remain partial to the view that Illinois' supreme court case law required the federal district court to apply the risk-utility doctrine in product liability cases, the varying strong convictions of my colleagues have convinced me that perhaps Illinois law may not be as conclusive as I once thought. Nevertheless, I write separately to counsel restraint when diversity requires our interpretation of Illinois Supreme Court case law.

When this court sits in diversity, federalism requires us to enforce the substantive law of the appropriate state, even when we conclude we see a more enlightened path. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . [a]nd whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."); *see also Guaranty Trust v. York*, 326 U.S. 99, 110 (1945) ("*Erie R. Co. v. Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties."), *overruled* on other grounds by *Hanna v. Plumer*, 380 U.S. 460 (1965). Federalism proscribes unwarranted federal judicial meddling in state matters because such interference would "prevent the informed evolution of state policy by state tribunals." *Moore v. Sims*, 442 U.S. 415, 429-30 (1979), citing *Trainor v. Hernandez*, 431 U.S. 434, 445 (1977).

While I appreciate the sound and persuasive policy reasons for limiting access to a risk-utility jury test when a plaintiff has freely undertaken to use a product with obvious risks, the Illinois Supreme Court, in cases such as *Lamkin*, 138 Ill. 2d at 528, 563 N.E.2d at 457, and *Doser*, 142 Ill. 2d at 197-98, 568 N.E.2d at 824, appears to disagree. In *Lamkin*, the Illinois Court defines a defective product as one that fails the risk-utility test. *See ante* at 6, discussing *Lamkin*, 138 Ill. 2d at 528, 563 N.E.2d at 457. In *Doser*, the Illinois Court confirmed the appropriateness of the risk-utility test for products with patent dangers. 142 Ill. 2d 176, 568 N.E.2d at 819. When analyzing unreasonably dangerous products in Illinois, "[t]he balancing of the likelihood and gravity of harm must be weighted against the burden of the precaution which would be effective to avoid the harm." *Id.*, citing *Burke v. Illinois Power Co.*, 57 Ill. App. 3d 498, 511, 373 N.E.2d 1354, 1367 (1st Dist. 1973). As the Illinois Supreme Court explained, in Illinois, "[w]hether a product is unreasonably dangerous for failure to incorporate safety devices is ordinarily a question of fact which the jury should resolve." *Doser*, 142 Ill. 2d 176, 568 N.E.2d at 820 & 824.

Neither *Lamkin* nor *Doser* appear to hint at any limitation of the risk-utility doctrine in Illinois. While *Scoby*, a decision from the Illinois Fourth District Appellate Court, may have rejected the risk-utility test as a means of analyzing whether lid-covers are required on cooking pots,[1] 211 Ill. App. 3d 106, 569 N.E.2d 1147, 1151 (1991), *Scoby* cannot in any way constrain *Lamkin* and *Doser*. In an

[1] A close reading of *Scoby* suggests that the Illinois appellate court actually conducted its own risk-utility test and concluded that a reasonable jury could never have found any economically feasible improvements to a cooking pot given the measured amount of risk. *See Scoby*, 211 Ill. App. 3d 106, 569 N.E.2d 1147, 1151. Thus *Scoby*, the only case cited by the dissent, indeed may not at all have held that a risk-utility balancing test is inapplicable for all patently dangerous products in the Fourth District.

hierarchical judiciary, judges of inferior courts may not limit decisions of superior courts. *See Gacy v. Welborn*, 994 F.2d 305, 310 (7th Cir. 1993). It is a "fundamental principle of judicial construction that the lower judicial tribunals in Illinois are bound by decisions of the Illinois Supreme Court, and it is the duty of such tribunals to follow those decisions in similar cases." *Greenlee v. Shedd Aquarium*, 36 Ill. App. 3d 924, 925, 344 N.E.2d 788, 790 (1st Dist. 1976) citing *Agricultural Transp. Ass'n. v. Carpentier*, 2 Ill. 2d 19, 116 N.E.2d 863 (1953). Definitive pronouncements of the State's Supreme Court, such as *Lamkin* and *Doser*, are binding upon inferior courts applying State law, "contrary [Illinois] appellate court decisions notwithstanding." *Greenlee*, 36 Ill. App. 3d at 925, 344 N.E.2d at 790. Whatever the preferences of this court, the Illinois Supreme Court's adoption of the risk-utility doctrine cannot be refashioned by the interpretive prowess of this tribunal.

Nevertheless, notwithstanding my initial read on Illinois Supreme Court case law, I assent to the majority's view—that some room for interpretation may exist in Illinois' law, and that certifying these questions to the Illinois Supreme Court is not wholly inappropriate. Thus, I join this court in its decision to affirm the district court's grant of BIC's motion for summary judgment on Plaintiff's warning theory, and to certify the consumer-contemplation and risk-utility questions for resolution by the Illinois Supreme Court.

RIPPLE, *Circuit Judge*, with whom CUDAHY, *Circuit Judge*, joins, concurring. I, like Judge Flaum, accept this court's judgment only after some pause. My concern focuses on the consumer contemplation test.

The consumer contemplation test has been set forth recently by the Supreme Court of Illinois in *Lamkin v. Towner*, 563 N.E.2d 449 (Ill. 1990). "A plaintiff may demonstrate that a product is defective in design . . . by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Id.* at 457. The issue with which we must grapple is the definition of a consumer for purposes of the *Lamkin* test. This issue is especially important in light of BIC's concession that Cori Smith is a foreseeable user of the lighter. If foreseeability is the crux of *Lamkin*'s consumer contemplation test, it would appear that BIC has conceded, not just a factual issue, but liability.

Most recently, in *Doser v. Savage Manufacturing & Sales, Inc.*, 568 N.E.2d 814 (Ill. 1990), the Illinois Supreme Court revisited the circumstances that will make a product unreasonably dangerous.

> The issue for the jury's determination was whether the press was unreasonably dangerous. In deciding this issue, the jury also had to determine whether the accident or injury was reasonably foreseeable. The liability of a manufacturer *extends to those individuals to whom injury from an unreasonably dangerous product may be reasonably foreseen.*

Id. at 824 (emphasis added). In the majority's view, this last sentence only describes the extent of duty, it does little to resolve the crucial question: "[W]hether foreseeable risks to non-purchasers are themselves enough to make the product 'unreasonably dangerous.' " *See* Opinion *ante* at 7. Therefore, it concludes, certification is warranted.

If the text of *Doser* were our sole concern, the need for certification would be weak. In the sentences preced-

ing the statement quoted by the majority, the Supreme Court of Illinois clearly stated that the issue for the jury's determination was whether the product was unreasonably dangerous. The Court then continued, "In deciding *this* issue, the jury also had to determine whether the accident or injury was reasonably foreseeable." *Doser*, 568 N.E.2d at 824 (emphasis added). This statement, I believe, makes it clear that foreseeability is an element in determining whether a product is unreasonably dangerous.[1]

If *Doser* were the only authority addressing the consumer contemplation test, I would favor simply applying *Doser*, the most recent statement from the Supreme Court of Illinois, and holding BIC liable under the consumer contemplation test because of its concession that Cori Smith is a foreseeable user of the lighter. However, I do not believe that we can consider only *Doser*. Over the years, the Illinois Supreme Court has had numerous occasions to consider liability under the consumer contemplation test. Some of these cases have focused on the ordinary consumer as an important factor in determining whether a product is unreasonably dangerous:

> The injuries must derive from a distinct defect in the product, a defect which subjects those exposed to the product to an unreasonable risk of harm. The Restatement (Second) of Torts concludes that strict liability applies only when the product is "dangerous to an extent *beyond* that which would be contemplated by the ordinary [person] . . ., with the ordinary knowledge common to the community as to its characteristics."

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[1] The dissent maintains that the Illinois Supreme Court never has mingled the concepts of foreseeable user and ordinary consumer—the first defines the extent of the manufacturer's duty and the second defines when a product is unreasonably dangerous. *Doser* is just such an example.

Hunt v. Blasius, 384 N.E.2d 368, 372 (Ill. 1978) (emphasis and changes in original). Similarly, *Lamkin* states this general standard for an unreasonably dangerous product before setting forth the two-prong design defect test. 563 N.E.2d at 457 ("A product is 'unreasonably dangerous' when it is 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.' " (citations omitted)). Cori Smith, in all likelihood, is not within the group of people contemplated by the *Blasius* formulation, but a test that focuses on foreseeability alone surely would encompass her.

Doser, while stating its own formulation, leaves undisturbed the prior statement in *Blasius*. The existence of seemingly irreconcilable statements is one of the situations that justifies certification. Certification ensures that the law we apply is the law of the state, not a federal view superimposed on state caselaw. *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1441 (7th Cir. 1988). Although we would be justified in applying *Doser* as the last pronouncement of Illinois' highest tribunal, prudence dictates that we afford the Supreme Court of Illinois an opportunity to construe definitively the consumer contemplation test. Accordingly, I concur in the certification of this issue. If the Supreme Court of Illinois should decline to accept this certification, however, we must accept the *Doser* formulation as definitive and apply it in all cases within our diversity jurisdiction.

POSNER, *Chief Judge*, with whom MANION and KANNE, *Circuit Judges*, join, dissenting in part. I agree that the plaintiff's claim of inadequate warnings should be dismissed, but I would go on and resolve the rest of the case along the lines proposed by Judge Manion. To certify abstract questions about the "consumer-contemplation test" and the "risk-utility test" to the state supreme court is to misunderstand the nature of common law adjudication.

Judges lack many things that legislators have, but one thing we have is first-hand experience with the facts crystallized in adversary litigation. In areas where the making of substantive rules—"legislating," in a sense—is left to judges, it is because the experience generated by the hearing of cases is thought an adequate or even a superior substitute for the sources of information and persuasion to which legislators turn (or are turned). Common law rules and principles well up out of the judges' experience with the facts of actual cases and are honed by the experience of encountering different facts in later cases.

This court is requesting the Supreme Court of Illinois to make rules applicable to all "non-purchasers" of dangerous or defective products and to "all consumer products whose risk can be appreciated by their intended users." But this is not a case about all non-purchasers or about all consumer products the risks of which are comprehensible by their intended users. It is a case about a small child who used a cigarette lighter to set a fire that killed another small child. The only issue we ought to be concerned with is whether the state supreme court would permit such a case to go to a jury. I say—with diffidence, in view of the disagreement within our court—that the answer is fairly clearly "no." As is plain from the long footnote in the majority opinion, the respective costs and benefits of child-resistant cigarette lighters raise difficult questions that a jury could not responsibly answer, and underneath them is the broader question how far, and through what institutional means, society should go to make ordinary household products child-proof (or child-resistant). If lighters are to be made child-proof, can kit-

chen knives, microwave ovens, and electrical sockets be far behind? Is a comprehensive national program of protecting children from the menaces of everyday life to be formulated and administered by—juries?

These issues are obscured by this pair of certified questions neither of which mentions children, lighters, or household products, thus inviting abstract answers that may not attend sufficiently to the particularity of this case or even of the class of cases to which it belongs. Of course the Supreme Court of Illinois is not required to answer our questions, *Citizens for John W. Moore Party v. Board of Election Commissioners*, 487 N.E.2d 946 (Ill. 1986) (per curiam); and we give it leave to reformulate them and we send it the record as well and it could I suppose restate our questions simply as, Should the district court be affirmed? But the purpose of the certification procedure is not to dump our cases, even our diversity cases, on state courts. *Kidney by Kidney v. Kolmar Laboratories, Inc.*, 808 F.2d 955, 957 (2d Cir. 1987); *Dorman v. Satti*, 862 F.2d 432, 435 (2d Cir. 1988); cf. *Doe v. American National Red Cross*, 976 F.2d 372, 374 (7th Cir. 1992). That would convert certification to abstention, and there is no suggestion that this is an appropriate case for abstention. Cf. *Lehman Bros. v. Schein*, 416 U.S. 386, 393 (1974) (concurring opinion). The purpose of certification is to identify controlling issues that can be resolved without immersion in the details of the case. *Doe v. American National Red Cross, supra*, 976 F.2d at 374; *Woodbridge Place Apartments v. Washington Square Capital, Inc.*, 965 F.2d 1429, 1434 (7th Cir. 1992); *Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1395 (7th Cir. 1992); see generally 17A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4248 (1988). There are many such questions, for example the question of statutory interpretation posed in our most recent certification to the Supreme Court of Illinois, *DeGrand v. Motors Ins. Corp.*, 903 F.2d 1100, 1104 (7th Cir. 1990), but the ones put by the majority in this case are not among them. Certification is rarely if ever appropriate in a fact-laden common law case, such as this.

I do not think we need worry that since there are no lighter manufacturers in Illinois we shall be draining all the lighter litigation from the Illinois state courts unless we certify these questions. Plaintiffs in product liability cases frequently join local dealers or distributors as additional defendants along with the manufacturer, thus destroying diversity; and decisions in Illinois cases in which children injure children with other household products might provide definitive guidance to federal courts in lighter litigation. There are plenty of reported Illinois cases involving manufacturers' liability for product injuries to children. See, e.g., *Cozzi v. North Palos Elementary School District No. 117*, 597 N.E.2d 683 (Ill. App. 1992); *Kempes v. Dunlop Tire & Rubber Corp.*, 548 N.E.2d 644 (Ill. App. 1989). Some even involve children using products to injure other children. In one a seven year old ran over a four year old with a gasoline-powered lawnmower. *Wenzell v. MTD Products, Inc.*, 336 N.E.2d 125 (Ill. App. 1975). (As usual in these cases, the manufacturer won.) In the only other diversity case (besides the present case) in this line, we had no difficulty resolving in favor of the manufacturer on the authority of previous decisions by the Illinois courts a case in which a lawn dart thrown by an eight year old had struck and grievously injured a two-and-a-half year old. *First National Bank v. Regents Sports Corp.*, 803 F.2d 1431 (7th Cir. 1986). Although lighters have been around for many years and the liberal regime of products liability is decades old, there is only one other reported case, state or *federal*, in Illinois dealing with a lighter injury inflicted by a child—and it was a toy lighter, and the case was brought and remained in state court, and the defendant won. *Van Skike v. Zussman*, 318 N.E.2d 244 (Ill. App. 1974).

There is little danger, therefore, that by deciding this case rather than bouncing it to the state supreme court (which may bounce it right back to us) we would be depriving the Illinois courts of their rightful control over the evolution of the common law of the state. The sparsity of lighter litigation in this state shows that a con-

ventional ground for certification, the probability of recurrence, *Kidney by Kidney v. Kolmar Laboratories, Inc.*, *supra*, 808 F.2d at 957, is, despite the majority's expressed concern with "attract[ing] all future [lighter] cases" into the federal courts in this state, absent too. I grant that the panel's 2-1 decision in favor of reversing the district judge's grant of summary judgment was so unexpectedly favorable to plaintiffs in this class of case that it might unless vacated have exerted the attractive force that concerns my colleagues. But it was vacated when we granted rehearing en banc. I voted to rehear the case en banc; I think we should bite the bullet and decide it now. By certifying these questions to the Supreme Court of Illinois we merely delay the resolution of the case, impair the proper operation of the common law process, and burden another court.

MANION, *Circuit Judge*, with whom POSNER, *Chief Judge*, and BAUER, COFFEY, and KANNE, *Circuit Judges*, join dissenting in part. I respectfully dissent. Although I agree with the court's resolution of the warning issue, I disagree that there is any need to certify the questions about the consumer contemplation test or the risk-utility test.

Even though we are incapable of creating binding state law, we can apply existing state law. *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 78 (1938). Certification is appropriate when the existing state law is hopelessly "unclear or conflicting." *Transamerica Ins. Co. v. Henry*, 904 F.2d 387, 390 (7th Cir. 1990). If state law is merely undeveloped on a particular issue, we should make our best predictive judgment. *Heller Intern. Corp. v. Sharp*, 974 F.2d 850, 858 (7th Cir. 1992). See Charles A. Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure* §4507, at 89 (1982) ("federal court must determine issues of state law as it believes the highest court of the state would determine them").

In *Lamkin*, the Illinois Supreme Court countenanced another test—the risk-utility test—to determine if a product is unreasonably dangerous. *Lamkin*, 563 N.E.2d at 457. Illinois courts have not yet extended this test to apply to a simple but obviously dangerous consumer product. The only intermediate Illinois appellate court which has considered the issue has determined that such an extension should never take place. *Scoby v. Vulcan-Hart Corp.*, 569 N.E.2d 1147, 1151 (Ill. App. 1991). As that court recognized, absurd results attach if courts apply the risk-utility test to a simple but obviously dangerous product. Consider the ordinary kitchen knife. Suppose a plaintiff cut by such a knife sued its manufacturer for failing to design a permanent retractable sheath for the knife. Should the plaintiff be able to avoid summary judgment simply by presenting statistics showing the feasibility of a permanent retractable sheath? The logical answer is no. As the court in *Scoby* recognized "[m]any manufactured products have a potential to cause substantial injury and most can be made safer by a different design." *Id.* That court refused to apply the risk-utility test to gauge a manufacturer's liability for failing to provide a cover for a kitchen fryer:

> We do not deem that Lamkin or other cases applying aspects of the danger-utility test intend that all manufacturers of products described above should be subject to liability depending on the trier of fact's balancing under that test, when suit is brought by one injured by such a product. Somewhere, a line must be drawn beyond which the danger-utility test cannot be applied. Considering not only the obvious nature of any danger here but, also, the simple nature of the mechanism involved, we conclude that the circuit court properly applied only the consumer-user contemplation test. Under that test, summary judgment for the defendant was clearly proper.

Id. Scoby is our best source to predict whether Illinois would apply the risk-utility test to a simple but obviously dangerous product, such as a lighter. See Wright, Miller

and Cooper, §4507, at 94 ("If a state's highest court has not ruled on an issue, intermediate appellate court decisions constitute the next best indicia of what state law is."). We do not overstep our bounds as a federal court by predicting that the Illinois Supreme Court would adopt the position advanced in *Scoby*.

Our system allows parties to present issues of state law to federal courts. 28 U.S.C. §1332; *Erie*, 305 U.S. 64. Bic and the Todds are before us, and we are capable of giving them an answer. Under readily apparent Illinois law, a lighter is not unreasonably dangerous. The district court correctly granted summary judgment in Bic's favor.

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—11-12-93

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60603
July 2, 1993

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETYH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ILANA D. ROVNER, Circuit Judge
Hon. FRANK A. KAUFMAN, Senior District Judge*

RODNEY TODD, as Special Administrator of the Estate of TIFFANY TODD, a deceased minor,	)	Appeal for the
	)	United States
	)	Disctict Court for
Plaintiff-Appellant,	)	the Northern
	)	District of Illinois,
No. 92-1201 v.	)	Eastern Division.
	)	
SOCIETE BIC, a foreign corporation, BIC CORPORATION, a foreign corporation, and BIC PEN CORPORATION, a foreign corporation,	)	**No.** 90 C 5487
	)	
	)	**Ann Claire**
	)	**Williams,** Judge.
Defendants-Appellees.	)	

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by defendants-appellees on May 11, 1993, and the response of plaintiff-appellant, a vote of the active members of the Court was requested and a majority of the judge in active service have voted to rehear this case en banc.

IT IS ORDERED that rehearing en banc be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the opinion entered in this case on April 27, 1993, be, and is hereby, VACATED. This case will be reheard en banc at the convenience of the Court.

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*The Honorable Frank A. Kaufman, Senior District Judge for the District of Maryland, sitting by designation, was a member of the original panel but took no part in the vote on the suggestion for rehearing en banc.

D1

In the
United States Court of Appeals
For the Seventh Circuit

No. 92-1201

RODNEY TODD, as Special Administrator
of the Estate of Tiffany Todd,
a deceased minor,

Plaintiff-Appellant,

v.

SOCIETE BIC, a foreign corporation,
and BIC CORPORATION, a foreign corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 5487—Ann C. Williams, *Judge.*

ARGUED OCTOBER 19, 1992—DECIDED APRIL 27, 1993

Before CUMMINGS, and MANION, *Circuit Judges,* and KAUFMAN, *Senior District Judge.**

KAUFMAN, *Senior District Judge.* This case arises out of a tragedy in which twenty-three month old Tiffany Todd was killed in a fire started by another child, four year old Cori Smith. The fire occurred on March 27, 1988, at

* The Honorable Frank A. Kaufman, Senior District Judge for the District of Maryland, is sitting by designation.

the home shared by the Todd and Smith families in Earleville, Illinois. Cori started the fire with a green BIC lighter manufactured by defendants which she found on a table in the living room.

At the time of the fire, the Todd family consisted of parents Rodney Todd, Sr. and Darlene Todd, and children Rodney Todd, Jr., Tiffany Todd, and Anya Rossi. The Smith family consisted of parents Herbert Smith and Kathy Smith, and children Nathan Smith, Erica Smith, and Cori Smith. All adults in the household smoked cigarettes. Herbert Smith used a Zippo lighter to light his cigarettes, Kathy Smith and Darlene Todd used BIC lighters or matches, and Rodney Todd, Sr. did not recall what he used to light his cigarettes. The within case was instituted by Rodney Todd, Sr., as Special Administrator of Tiffany's estate.

Sometime before 8:00 a.m. on March 27, 1988, Cori awoke and went into the living room of the house, where she found the green lighter on a table. She took the lighter and went upstairs to the bedroom where Tiffany Todd was sleeping and ignited some papers on the floor. Cori then went back downstairs, replaced the lighter, and got a glass of water in order to extinguish the fire. BIC contends that Nathan Smith, who was in the living room at the time watching cartoons, instructed Cori not to go upstairs with the water and that Cori left the glass of water downstairs. Plaintiff suggests that Cori may have gone upstairs with the water. At any rate, Cori went upstairs again and then came running back downstairs with Rodney Todd, Jr. screaming that there was smoke. The adults were alerted, and Rodney Todd, Sr. and Herbert Smith tried unsuccessfully to retrieve Tiffany from her room. Everyone in the house escaped to safety except Tiffany, who perished.

About a week prior to the fire, Cori had obtained a lighter and had started a small fire in her parents' bedroom. Also prior to the fire in which Tiffany was killed, Cori and the other children had been instructed by their parents concerning the dangers of fire and had been warned

not to play with matches or lighters. Cori has admitted that she was aware of the danger of playing with matches and lighters prior to the fatal fire.

I

In this diversity case plaintiff has proceeded in the United States District Court for the Northern District of Illinois under Illinois law pursuant to theories of strict liability in tort, negligence, and abnormally dangerous activities. The district court granted summary judgment in favor of BIC. Herein, plaintiff does not appeal with respect to his theory of abnormally dangerous activities but does appeal from the grant of summary judgment against him with respect to the theories of strict liability and negligence. In so doing, plaintiff asserts that the BIC lighter was unreasonably dangerous because it did not include enhanced child-resistant features and also because it did not provide adequate warnings. Although the lighter Cori used bore a warning label stating: "KEEP OUT OF REACH OF CHILDREN," plaintiff claims that that warning was inadequate, since it did not warn of the special danger to children in the three to five year age range, children who, even when warned about the dangers of fire and instructed not to play with matches or lighters, cannot be expected to have the self-control to heed such warnings and instructions.

For the purposes of its summary judgment motion, BIC, in the court below, conceded that it was foreseeable as of the date of the fire that a child of Cori's age might obtain and operate a lighter and that, as of that date, it was feasible to design and manufacture a lighter with enhanced child-resistant features. In fact, since the spring of 1992, BIC has marketed a lighter with child-resistant features. The lighter has an "over-and-up" design in which, in addition to the roll-and-press operation of the standard lighter, in which the user slides his or her thumb down the spark wheel and then presses down on the lever underneath to release butane and ignite the gas, the user

also has to move a safety latch beneath the lever over and then up. That safety latch automatically returns to the locked position after each use. The BIC lighter, which is so designed, resulted from a BIC project to make its lighters more child-resistant which began in 1985.

II

In granting summary judgment in favor of defendants on the strict liability in tort claim, the court below applied, pursuant to applicable Illinois law, the consumer-contemplation test, under which, in order for a product to be unreasonably dangerous and for the manufacturer to be subject to strict liability, the product must be " 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.' " *First National Bank of Dwight v. Regent Sports Corp.*, 803 F.2d 1431, 1436 (7th Cir. 1986) (quoting Restatement (Second) of Torts § 402A, comment i (1964)). In that context, the district court posed the question of whether BIC owed plaintiff a duty to manufacture its lighters with child-proof devices, a question which the district court characterized as one of law for the court to decide. Answering the question, the court concluded that, as a matter of law, the BIC lighter was not unreasonably dangerous because of lack of child-resistant features or because of inadequacy of warning and granted summary judgment to BIC with respect to the strict liability claim. The district court also determined that the lighter performed in the manner expected of a lighter and that adults, the ordinary purchasers, are capable of contemplating the danger of the lighter's characteristics. The district court further concluded that the potential dangers posed by BIC's lighters were obvious and that that very obviousness of danger puts the user on notice. *Cf. Killeen v. Harmon Grain Products, Inc.*, 413 N.E.2d 767 (Mass. App. 1980) (manufacturer of cinnamon-flavored toothpicks not liable for injuries sustained by ten-year old girl who

fell face down while sucking on one of defendant's toothpicks, since toothpicks are not unreasonably dangerous, in part because the very obviousness of their danger puts the user on notice). Accordingly, the court below took the position that not only was the warning on the lighter adequate, but also that BIC had no duty to warn because its lighters were not unreasonably dangerous and any danger which they posed was obvious. Further, the district court noted that had the warning on the lighter been heeded, the lighter could have been used safely. Thus, in effect, any failure to warn would have lacked proximate cause and any additional warnings could not have been expected to have prevented the accident, since, by their own testimony, the adults in the Smith/Todd household knew of and warned their children about the dangers of playing with lighters and Cori understood those dangers. The court inferred that the adult Todds and the adult Smiths understood the potential dangers of children playing with lighters.

The district court expressed the above summarized views in the course of granting summary judgment upon plaintiff's strict liability theory and then utilized the same lack of duty approach in awarding BIC summary judgment upon plaintiff's negligence claim.

III

We review de novo a district court's grant of summary judgment. *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 905 (7th Cir. 1990). "Summary judgment is appropriate only if, drawing all reasonable inferences in favor of the nonmoving party, we conclude that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320 (7th Cir. 1992).

Under Illinois law, in order to prevail upon his strict liability in tort claim, plaintiff must show that his "injury or damage resulted from a condition of the product, that

the condition was an unreasonably dangerous one and that the condition existed at the time it [the product] left the manufacturer's control." *Suvada v. White Motor Co.*, 210 N.E.2d 182, 188 (Ill. 1965). Plaintiff easily meets his burden as to the first and third of those three elements. It is the second element which caused plaintiff to fail in the court below. A product may be defective in the way which makes it unreasonably dangerous for any of the following reasons: 1) a manufacturing flaw, 2) a failure of the manufacturer to adequately warn of a risk related to the way the product was designed, or 3) a defective design. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 695 (5th ed. 1984). In the within case, the plaintiff alleges that the BIC lighter is unreasonably dangerous by reason of inadequacy of the warning and by reason of a defective design, namely the lack of child-resistant features. In *Lamkin v. Towner*, 563 N.E.2d 449, 457 (Ill. 1990), Illinois' highest court enunciated the ways in which a plaintiff may show the unreasonably dangerous condition of a product by reason of defective design. In *Lamkin*, that court has written:

> A plaintiff may demonstrate that a product is defective in design, so as to subject a retailer and a manufacturer to strict liability for resulting injuries, in one of two ways: (1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner *or* (2) by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs.

Id. (emphasis added) (citations omitted). In the proceedings below, the district court, in determining that the BIC lighter was not unreasonably dangerous because of defective design, utilized only the first way, the consumer-contemplation test. In so doing, the district court failed to apply alternatively the risk-utility test.

BIC argues that where a mechanism is simple and the danger is obvious, only the consumer-contemplation test is applicable under Illinois law. However, the risk-utility test—and the extent of its applicability—is now well established in Illinois law. *Faucett v. Ingersoll-Rand Min. & Machinery Co.*, 960 F.2d 653, 655 (7th Cir. 1992). "[T]he consumer-contemplation test is inadequate as a basis for impugning the design of products with obvious dangers," although it is well-suited to "impugn the design of products with latent and unknowable risks where the benefits already outweigh the danger-in-fact." KEETON et al., *supra*, § 99, at 702. Thus, in effect, in a case like this one, the consumer-contemplation test is inadequate because, for one thing, under it, "a victim could never recover for harm suffered as a result of a design hazard that was open or obvious," even if the product "could easily have been designed safer without great expense or effect on the benefits or functions to be served by the product." *Id.* at 698.

BIC relies upon *Scoby v. Vulcan-Hart Corp.*, 569 N.E.2d 1147 (Ill.App. 4 Dist. 1991) in support of BIC's contention that when a mechanism is simple and the danger is obvious, only the consumer-contemplation test is to be applied. *Id.* at 1151. In *Scoby*, a restaurant employee was injured when he slipped in the kitchen and his arm became submerged in a deep-fat fryer. Illinois' intermediate appellate court, in affirming the trial court's grant of summary judgment in favor of the manufacturer, applied only the consumer-contemplation test, and in so doing, BIC asserts, recognized that the parties had stipulated that safer alternative designs available at the time of the accident could have prevented the accident. BIC is mistaken. The parties in *Scoby* only stipulated that fryer covers were available and sold by the manufacturer and that if a cover had been on the fryer at the time of the accident, the employee's hand would not have come into contact with the oil in the fryer. *Id.* at 1148-49. In fact, the covers were "not designed, manufactured, marketed, or sold by [the manufacturer] as . . . safety device[s]." *Id.* at 1149. Thus, there was no stipulation that safer alternative designs were avail-

able. Indeed, Illinois' intermediate appellate court seemingly suggested that safer alternative designs were not possible, stating: "Clearly, at times, efficient kitchen operation would require keeping a top off of the fryer." *Id.* at 1151.

The lack of a safer alternative design is an important factor in determining whether the risk-utility test is applicable because "[t]he risk/benefit analysis classifies a product as unreasonably dangerous when the evidence establishes that the product 'could have been designed to prevent a foreseeable harm without hindering its function or increasing its price.' " *Faucett*, 960 F.2d at 655 (quoting *Palmer v. Avco Distributing Corp.*, 82 Ill.2d 211, 45 Ill. Dec. 377, 382, 412 N.E.2d 959, 964 (1980)). In *Lamkin*, in which plaintiffs contended that a window screen was unreasonably dangerous for not being child-proof, the Supreme Court of Illinois reversed the lower court's denial of summary judgment because plaintiffs-appellees had failed to provide evidence that the window screen's design could have been altered to create a safer screen. *Lamkin*, 563 N.E.2d at 458.

In *Scoby*, [illegible] appellate court wrote that "[s]omewhere, a line must be drawn beyond which the danger-utility test cannot be applied," and then proceeded itself to draw that line in that case, citing to the obviousness of the danger and the simplicity of the mechanism of the deep-fat fryer. Perhaps, then, the line may be drawn where the mechanism is so simple and the danger is so obvious that no other safer alternative design is possible, or at least where there is no evidence of such, as apparently was the case in *Scoby* and in *Lamkin*. Such is not the case here, however. In the within case, BIC conceded in the court below in the context of its summary judgment motion that a safer alternative design was feasible; and in fact, BIC has marketed such a child-resistant design since the spring of 1992. In this case, then, in determining whether the BIC lighter was unreasonably dangerous, the risk-utility test should be applied, particularly since the consumer-contemplation test is inadequate as a basis for impugning

the design of products with obvious dangers. Furthermore, "[u]nder Illinois law, '[w]hether a product is unreasonably dangerous for failure to incorporate safety devices is ordinarily a question of fact which the jury should resolve.' " *Faucett*, 960 F.2d at 655 (quoting *Doser v. Savage Manufacturing and Sales, Inc.*, 142 Ill.2d 176, 154 Ill.Dec. 593, 589-99, 568 N.E.2d 814, 819-20 (1990)). Given the concession of BIC that there was a feasible safer alternative design, there exists in this case a disputed issue of material fact regarding the weighing of the risks and benefits of the BIC lighter's design, which makes the grant of summary judgment inappropriate.

Plaintiff asserts that the district court's grant of summary judgment in favor of BIC was inappropriate not only because the district court failed to apply the risk-utility test, but also because the district court misapplied the consumer-contemplation test. In that connection, plaintiff argues that the latter test should have been applied from the point of view of all foreseeable users, including children, rather than only from the point of view of ordinary purchasers, namely adults.

Under the consumer-contemplation test, in order to find a product unreasonably dangerous and the manufacturer thereby strictly liable, the product must be " 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.' " *First National Bank of Dwight v. Regent Sports Corp.*, 803 F.2d 1431, 1436 (7th Cir. 1986) (quoting Restatement (Second) of Torts § 402A, comment i (1964)). In order to expand the scope of protection to non-purchasers, "many courts have substituted 'ordinary user' or 'foreseeable user' for 'ordinary purchaser' thereby making it possible for victims to recover if the hazard was of a kind that would not have been contemplated by reasonably foreseeable users even though it was one that would have been contemplated by the ordinary purchaser-consumer." KEETON et al., *supra*, § 99, at 698. Illinois law applies the consumer-contemplation test from the point

of view of foreseeable users, defining an unreasonably dangerous condition as "one which is unsafe with respect to a foreseeable use, or one which is 'objectively reasonable' to expect, a determination generally left to the jury." *Pierce v. Hobart Corp.*, 512 N.E.2d 14, 16 (Ill.App. 1 Dist. 1987) (quoting *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1, 5 (1974)). In *Winnett*, the Supreme Court of Illinois ruled that "the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used." 310 N.E.2d at 4. In this case, BIC has conceded, for the purpose of the summary judgment motion, that it was foreseeable that a child of the approximate age of Cori Smith would obtain and operate a BIC lighter. Therefore, children in Cori Smith's age range would appear to be foreseeable users and should at least be considered in applying the consumer-contemplation test. The district court made its analysis under that test only with regard to adults, the ordinary purchasers, and found that adults are capable of contemplating the danger of the lighter's characteristics. The district court should have permitted a jury to consider children, as possible foreseeable users, under the consumer-contemplation test.

The district court also concluded as a matter of law that adults are capable of contemplating all of the dangers that the lighter presents. Given plaintiff's claim and support in the record for the proposition that children in the three to five year old age range do not have the self-control, even when warned about the dangers of fire and instructed not to play with matches or lighters, to heed such warnings, and the claim that adults are not aware of this lack of self-control, there is at least a disputed issue of material fact as to whether adults are aware of the full extent of the danger which the lighter presents. Thus, the district court should not have ruled with regard to that factual question as a matter of law. Rather, the district court should have permitted a jury to consider that question.

In disposing of plaintiff's claim that the BIC lighter was defective by reason of the inadequacy of the warning, the district court concluded that BIC in fact had no duty to warn at all, as its lighters were not unreasonably dangerous and as any danger which they did pose was obvious. *See Taylor v. Gerry's Ridgewood, Inc.*, 490 N.E.2d 987, 991 (Ill.App. 3 Dist. 1986) (". . . there is no duty to warn where the product is not defectively designed or manufactured and where the possibility of injury results from a common propensity of the product which is open and obvious.") As there is a disputed issue of material fact as to whether the BIC lighter was unreasonably dangerous and as to whether all the dangers posed by the lighter were obvious, the district court should not have decided as a matter of law that BIC had no duty to warn.

BIC, however, did provide the warning, "KEEP OUT OF REACH OF CHILDREN." The question arises as to whether that warning was adequate. The district court determined that it was, reasoning that had the warning on the lighter been heeded, the lighter could have been used safely. In any event, by the determination of the court below, any possible inadequacy of the warning was not a proximate cause of plaintiff's injury. That was so, reasoned the district court, because any additional warnings may not have prevented the accident in this case, since the adults in the Smith/Todd household understood the potential dangers of children playing with lighters and still left the BIC lighter in a place where Cori could easily obtain it. "Where a warning has been communicated, a manufacturer is entitled to assume that the user will read and follow the furnished instructions." *Taylor*, 490 N.E. 2d at 992. However, the warning must still be adequate. "Warnings may be inadequate if they: (1) do not specify the risk presented by the product; (2) are inconsistent with how a product would be used; (3) do not provide the reason for the warnings; or (4) do not reach foreseeable users." *Collins v. Sunnyside Corp.*, 496 N.E.2d 1155, 1157 (Ill.App. 1 Dist. 1986). "The adequacy of the warning is usually a jury question." *Id.* Plaintiff argues that the statement,

"KEEP OUT OF REACH OF CHILDREN," does not specify the risks presented by the lighter, namely, that young children may be able to operate the lighter and the special danger that children in the three to five year old range, even when warned about the dangers of fire and instructed not to play with matches or lighters, do not have the self-control to heed such warnings. Plaintiff also contends that the statement does not provide the reasons for the warning. However, "the defendant must have actual or constructive knowledge of the danger before a duty to warn arises." *Harnischfeger Corp. v. Gleason Crane Rentals, Inc.*, 585 N.E.2d 166, 173 (Ill.App. 5 Dist. 1991). "A manufacturer is held to the degree of knowledge and skill of experts in the design of its products." *Collins v. Interroyal Corp.*, 466 N.E.2d 1191, 1200 (Ill.App. 1 Dist. 1984). Plaintiff claims that BIC, as the manufacturer of the lighter, knew or should have known of the special danger that children in the three to five year old range, although warned not to, nevertheless often will play with lighters. Plaintiff also asserts that as the ordinary adult is not fully aware of such danger, BIC had a duty to warn of it. *See, e.g., Sunnyside*, 496 N.E.2d at 1157 ("The purpose of a warning is to apprise a person of a danger of which he is not aware, and thus enable the person to protect himself against it.") Furthermore, if a jury were to find that the warning was inadequate, the inadequacy may be a proximate cause of the injury in this case, as, had BIC warned of the special danger regarding children in the three to five year old range, the adults in the Smith/Todd household may have been more careful concerning where they left the lighter. Thus, as there are disputed issues of material fact as to the obviousness of the danger that children in the three to five year old age range will play with lighters though warned not to so play and as to the adequacy of the warning which BIC provided, the district court should not have granted summary judgment in favor of BIC with respect to those issues.

IV

In a products liability context, a manufacturer is under a nondelegable duty to produce a product which is reasonably safe. *Coney v. J.L.G. Industries, Inc.*, 454 N.E.2d 197, 203 (Ill. 1983). "Thus, the breach of duty is the same in both a negligence and strict products liability claim, but the key distinction between a negligence claim and a strict liability claim lies in the fault concept. In a negligence claim, the focus is on the fault of the defendant. In a strict products claim, the focus is on the condition of the product, regardless of fault." *Phillips v. U.S. Waco Corp.*, 516 N.E.2d 670, 674 (Ill.App. 1 Dist. 1987). Since the district court determined under its strict liability analysis that BIC did not have a duty to manufacture its lighters with child-resistant features or to give additional warnings, it also granted summary judgment to BIC as to the negligence claims. As we now conclude that there are disputed issues of material fact as to BIC's duty to manufacture its lighters with child-resistant features and as to the adequacy of the warning, we hold that grant of summary judgment on the negligence claims was error.

V

Given BIC's concession that a safe alternative to its lighter, with child-resistant features, was feasible, the failure of the district court to apply the risk-utility test was error. Under that test, there are disputed issues of material fact as to the weighing of the risks and benefits of the BIC lighter. Further, the district court did not fully correctly apply the consumer-contemplation test, since it did not include children as foreseeable users in its analysis. Under the consumer-contemplation test, there is a disputed issue of material fact as to whether adults fully contemplate all the dangers presented by the BIC lighter. In addition, there are other disputed issues of material fact as to the adequacy of the warning which BIC provided. For the foregoing reasons, the district court should not have granted summary judgment in favor of BIC in con-

nection with plaintiff's strict liability or negligence claims. The decision of the lower court is therefore REVERSED and this case is REMANDED for further proceedings consistent with this opinion.

MANION, *Circuit Judge, dissenting.* I agree with the district court's application of the consumer contemplation test, its refusal to apply the risk-utility test, its conclusion that the warning "KEEP OUT OF REACH OF CHILDREN" was adequate as a matter of law, and its conclusion that BIC was not negligent. Therefore, I respectfully dissent from the court's opinion reversing the district court.

First, I disagree with this court that under the consumer contemplation test "there is at least a disputed issue of material fact as to whether adults are aware of the full extent of the danger which the lighter presents." (p.10) As a matter of law, adults are fully aware that a lighter in the hands of a child is dangerous. Cf. *Killeen v. Harmon Grain Products, Inc.*, 413 N.E.2d 767, 770 (Mass. App. 1980). And even though the most imaginative adults are not "fully aware" of all the horrors which accompany burn injuries, this does not detract from their general knowledge of the danger of lighters. The Todds and the Smiths certainly knew about the danger of lighters; they were given a loud and clear warning that a lighter in the hands of a child is extremely dangerous. About a week before the fire which caused Tiffany's death, Cori Smith had used a lighter to start a small fire in her parents' bedroom. In that instance, however, tragedy was avoided, and the parents reproached her and the other children about the dangers of lighters. Therefore, the inherent danger of lighters was not beyond the parents' contemplation. Nor are such dangers beyond the contemplation of most people who know to keep lighters from children.

The court also posits that when applying the consumer contemplation test, courts should consider not only what is possible in the contemplation of the foreseeable purchaser but also the foreseeable user. In this case, that standard requires that BIC's liability should be gauged according to whether the product performed in a manner consistent with the expectations of ordinary four-year-olds. It is unrealistic to require a manufacturer to consider the reasonable expectations of young children when marketing products. Young children lack a capacity for reason, and certainly lack expectations concerning consumer products. The standard proposed by the court effectively mandates that all products with a degree of danger imperceptible to young children are "unreasonably dangerous" when it is foreseeable that they might get their hands on them. No manufacturer should be held to such an unreasonable standard.

Next, I take issue with the court's application of the risk-utility test. There are certain products which, though simple in design, pose obvious dangers. A knife is such a product; so is a lighter. To what extent should the law protect users of these products? Should we allow a jury to decide, for instance, whether a permanent retractable sheath should be required for an ordinary kitchen knife? I believe Illinois would apply the principle stated in *Scoby v. Vulcan/Hart Corp.*, 569 N.E.2d 1147, 1151 (Ill. App. 1991), which recognized that "[m]any manufactured products have a potential to cause substantial injury, and most can be made safer by a different design." *Id.* at 1151. That court went on to refuse to apply the risk-utility test to a manufacturer's failure to provide a cover for a kitchen fryer:

> We do not deem that *Lamkin* or other cases applying aspects of a danger-utility test intend that all manufacturers of products described above should be subject to liability depending on a trier of fact's balancing under that test, when suit is brought by one injured by such a product. Somewhere, a line must be drawn beyond which the danger-utility test cannot be applied. Considering not only the obvious nature

> of any danger here but, also, the simple nature of the mechanism involved, we conclude the circuit court properly applied only the consumer-user contemplation test. Under that test, summary judgment for the defendant was clearly proper.

Id. Scoby is our best source to predict whether Illinois would apply the risk-utility test to a simple but obviously dangerous product, such as a lighter. Under *Scoby*, the risk-utility test should not be applied.

Finally, I disagree that there is a question of fact as to whether the warning "KEEP OUT OF REACH OF CHILDREN" failed to adequately warn that the product should be kept out of the reach of children. As a matter of law, this warning specified the risk presented by the lighter: that it was dangerous in the hands of children. The court speculates that a legally sufficient warning might include an admonition stating the dire consequences if the warning were not heeded. I challenge anybody to draft such a warning, and condense it to fit on the side of a pocket lighter. I wonder if anybody would bother to read such a treatise before lighting a cigarette. (The smoker in this case obviously did not heed the warning already on the cigarette package.) In any event, the message contained in the succinct phrase "KEEP OUT OF REACH OF CHILDREN" adequately states the danger and provides a proper warning as a matter of law. Indeed, had the owner of the lighter heeded the warning, there would not have been an accident.

Although the circumstances of this case are tragic, tragedy alone does not warrant our expansion of Illinois strict products liability law. BIC manufactures lighters; they are dangerous when misused. This does not mean a jury should decide BIC's liability for every consequence of misuse. As a matter of law, lighters are not unreasonably dangerous. And because BIC did not breach a duty to consumers by manufacturing an unreasonably dangerous product, the district court also was correct in determining that BIC was not negligent.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

E1

No. 76438 Rodney Todd, etc., appellant
v. Societe BIC, S.A., et al., appellees.

Order of certification from the United States Court of Appeals for the 7th Circuit pursuant to Supreme Court Rule 20. This Court respectfully declines to answer the questions of law certified to this Court by the United States Court of Appeals for the Seventh Circuit in its case No. 92-1201.

F1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RODNEY TODD, as Special Administrator of the Estate of TIFFANY TODD, a deceased minor	)	
Plaintiff,	)	
v.	)	**No.** 90 C 5487
SOCIETE BIC, a foreign corporation, BIC CORPORATION, a foreign corporation, and BIC PEN CORPORATION, a foreign corporation,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Rodney Todd ("Todd"), as administrator of the estate of Tiffany Todd, brought this action against defendants Societe Bic and BIC Corporation ("BIC"). The plaintiff claims that he is entitled to recover from the defendants on the basis of strict product liability and negligence. This case is presently before the court on defendant BIC's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons stated below, defendant BIC's motion for summary judgment is granted.

Background

On March 27, 1988, the Todd family and the Smith family occupied a farmhouse in Earleville, Illinois. The Todd family consisted of Rodney Todd, Sr., Darlene Todd, Rodney Todd, Jr., Tiffany Todd and Anya Rossi. The Smith family consisted of Herbert Smith, Kathy Smith, Nathan Smith, Eric Smith and Cori Smith. Anya Rossi and Eric Smith were not in the house on the morning of March 27, 1988.

During the time period at issue in this case, Kathy Smith, Herbert Smith, Rodney Todd, Sr., and Darlene Todd smoked cigarettes. Herbert Smith used a Zippo lighter to light his cigarettes, Kathy Smith used a BIC lighter, Darlene Todd used a BIC lighter or matches, and Rodney Todd, Sr. does not recall what he used to light his cigarettes.

Sometime before 8:00 a.m. on March 27, 1988, four-year old Cori Smith awoke and walked into the living room of the farmhouse. Cori found a green BIC lighter on the end table in the living room. She took the lighter upstairs to the bedroom which she shared with twenty-three-month old Tiffany Todd and ignited some papers on the floor of the room. Cori then returned downstairs and replaced the lighter on the end table.

Cori then obtained a glass of water.

The defendant contends that Nathan Smith cautioned Cori not to take the glass of water upstairs because it was forbidden to eat or drink in the upstairs bedrooms and Cori left the glass of water downstairs. The plaintiff suggests that Nathan may not have warned Cori regarding the rule against food or drinks in the upstairs bedrooms and Cori may have taken the glass of water upstairs. In any event, the parties agree that Cori subsequently went back upstairs and came running back down. Rodney Todd, Jr., who had also been upstairs, followed Cori downstairs yelling that there was a fire in the bedroom where Tiffany was sleeping. The parents awoke due to the children's shouts that a fire had started. The families unsuccessfully attempted to rescue Tiffany from the burning bedroom. However, the heat and smoke in the farmhouse became so intense that the occupants exited when the fire department arrived. Tiffany Todd did not survive the fire.

The Smiths and the Todds have testified that they were aware of and warned their children regarding the dangers of playing with matches of lighters. Approximately one week before the fire, Cori had obtained a lighter and lit a small fire in her parents' bedroom.

On or about that time, Rodney Todd, Sr. advised Cori Smith not to play with lighters or matches because of the potential danger posed by fire. Darlene had also given Cori a similar warning. Cori Smith has testified that she was aware of the danger of playing with matches or lighters prior to the fire which caused Tiffany Todd's death.

Rodney Todd, Sr. initiated this action in March 1990 on behalf of the estate of his daughter, Tiffany Todd. The complaint alleges three counts based upon strict products liability and three counts based upon negligence. Although the plaintiff recognizes that BIC lighters carry a warning which states "Keep out of reach of children," the plaintiff's claim rely heavily on his contention that the BIC lighter at issue in this case was unreasonably dangerous because it did not include a child-resistant device and did not provide adequate warnings. BIC now moves for summary judgment on the case pursuant to Federal Rule of Civil Procedure 56.

The Summary Judgment Motion

Summary Judgment is appropriate in a case where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.

Wolf v. Fitchburg, 870 F.2d 1327 (7th Cir. 1989). After the moving party makes a properly supported motion for summary judgment, the nonmoving party bears the burden of refuting the motion by setting forth specific facts showing the existence of a genuine issue of fact for trial. Shlay v. Montgomery, 802 F.2d 918, 920 (7th Cir. 1986). When assessing a motion for summary judgment, the court must view all evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmoving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Counts I, II, and III of the plaintiff's complaint allege a strict liability action against the defendants. The Illinois Supreme Court adopted the theory of strict products liability in Suvada v. Shite Motor Company, 32 Ill.2d 612, 210 N.E.2d 182 (1965). In Suvada, the court adopted the position taken in Section 402A of the American Law Institute's revised Restatement of the Law of Torts.[1] To recover in strict

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[1]Section 402A requires:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer of to

liability under Illinois law "the injury must result from a condition of the product, the condition must be unreasonably dangerous and the condition must have existed at the time the product left the manufacturer's control." Hunt v. Blasius, 74 Ill.2d 203, 210, 384 N.E.2d 368 (1978); see also First National Bank of Dwight v. Regent Sports Corp., 803 F.2d 1431, 1436 (7th Cir. 1986). It is also well-recognized under Illinois law that a failure to warn of a

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his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to reach the user or consumer in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

product's dangerous propensities may serve as the basis for holding a manufacturer of seller strictly liable in tort. Woodill v. Parke Davis & Co., 79 Ill.2d 26, 402 N.E.2d 194, 196 (1980); First National Bank of Dwight. 803 F.2d at 1436.

Manufacturers are thus under a non-delegable duty to produce a product that is reasonably safe. Coney v. J.L.G. Industries, Inc., 97 Ill.2d 104, 454 N.E.2d 197, 203 (1983). In order to classify a product as unreasonably dangerous, "the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." First National Bank of Dwight, 803 F.2d at 1436 (citing Restatement (Second) of Torts § 402A, comment i (1964). The Illinois Supreme Court has stated that:

> Virtually any product is capable of producing injury when put to certain uses or misuses...Injuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product. The injuries must derive from a distinct defect

> in the product, a defect which subjects those exposed to the product to an unreasonable risk of harm." Hunt, 74 Ill.2d at 211-12, 384 N.E.2d at 372.

Defendant BIC asserts that it is entitled to summary judgment on the strict liability claims because BIC did not owe Todd a duty to manufacture BIC lighters with child-proof devices. The plaintiff counters that BIC owed him such a duty because without such a child-proof device, BIC's lighter is unreasonably dangerous. The question of whether defendant BIC had a duty to manufacture its lighters with child-proof devices is a questions of law and therefore must be determined by the court. Ward v. K Mart Corp., 136 Ill.2d 132, 554 N.E.2d 223 (1990). A court in this district addressed this exact question in a factually similar case. In Scarpetta v. Health-Tex Corp., Anthony Scarpetta left his BIC lighter on the coffee table on the first floor of his friend's, Susan Johnson, home and then went upstairs. 1990 U.S. Deist. LEXIS 5119 (April 26, 1990). The plaintiff, three-year-old Jennifer Scarpetta, and Johnson's two children, six and one-half-year-old Gabriel and four-year-old Jessica, remained downstairs. When Gabriel tried

to show the other children how to light the lighter, he dropped the lighter on Jennifer's shirt. Anthony Scarpetta rushed downstairs when he heard screams and found Jennifer with her shirt on fire. He put out the fire and Susan Johnson called the paramedics. Id.

The court in Scarpetta granted defendant BIC's motion for summary judgment on the strict liability claims because the court found that the BIC lighter was not unreasonably dangerous. The court determined that the ordinary consumer of a lighter is an adult who is capable of contemplating the danger of the lighter's characteristics. Id. The court also determined that the lighter did not fail to perform in the manner expected considering its nature and intended function. Therefore, the injury, while unfortunate, was not the result of a danger unrecognizable to the average consumer. Id. In addition, the court held that the lighter's attached warning to keep it away from children sufficed to avoid liability in this case. The court found that the lighter was not unreasonably dangerous if used according to the warning's instructions and held as a matter of law that plaintiff's claims did not support a strict products liability action. Id.

Courts in other jurisdictions which follow the Restatement's interpretation of strict liability law have reached similar conclusions. For example, in Byler v. Scripto-Tokai Corp., the court determined that the defendant's failure to manufacture a child-proof lighter did not support the plaintiff's strict liability claim. The court stated:

> ...This court concludes, as a matter of law, that the defendant had no duty to child-proof its lighters and the lighter was not unreasonably dangerous. To hold otherwise would require the court to conclude that the manufacturers of lighters, matcher, stoves, and other potentially flammable items have a duty to child-proof their products. Here, the defendant's product performed the function it was intended to perform and prudent manufacturers, being aware of the risk to children, would as defendant did here, place this product in the stream of commerce. A product is not unreasonably dangerous under Kentucky law and therefore defendant is entitled to summary judgment on the issue. No. 89-0016-L (D. Ky. July 27, 1990).

Similarly, the court in Lasseigne v. BIC Corporation recognized that simply because in the hands of a child an item does not function as it is intended or

results in unintended consequences, the item is not necessarily unreasonably dangerous. No. GC-G-88-391 (Fla. Cir. Ct. May 31, 1989); See also Eads v. BIC Corporation, 740 F. Supp. 1433 (W.D. Mo. 1989); Sedlock v. BIC Corporation, 741 F. Supp. 175 (W.D. No. 1990); Wise v. BIC Corporation, No. 88-59914-DP (Mich. Cir, Ct. July 3, 1990); Bean v. BIC Corporation, 89-32821 (Ala. Cir. Ct. June 5, 1991).

Like the courts in the previously cited cases, this court finds that the BIC lighter at issue in this case is not unreasonably dangerous because it is not child-resistant or the warning label is inadequate. The lighter in this case, like the lighter in Scarpetta, is a product ordinarily purchased and used by adults who are capable of contemplating the danger of the lighter's characteristics. Furthermore, the plaintiff does not allege that the BIC lighter failed to perform in the manner expected of a lighter. Tiffany Todd's death, therefore, was not the result of a danger unrecognizable to the average adult consumer.

Tiffany's death was the result of the improper use of the lighter at issue by a child. While tragic and extremely regrettable, this court cannot hold the

defendant liable for the unfortunate accident which caused Tiffany's death. As the court stated in Byler, the lighter cannot be considered unreasonably dangerous because a child's use of the product caused unintended consequences. This court agrees with the court in Byler that to hold otherwise would be to impose a duty on the manufacturers of any potentially flammable product to child-proof these products. Therefore, defendant BIC is entitled to summary judgment on the products liability claims because, as a matter of law, its lighter was not unreasonably dangerous.

This decision comports with the persuasive conclusions drawn in several cases where the courts, relying upon the Restatement's interpretation of strict liability law, did not require adult products to be made child-proof. In Killeen v. Harmon Grain Products, Inc., for example, the plaintiff alleged, among other things, that the defendant manufacturer and seller of cinnamon-flavored toothpicks was liable for the injuries sustained by a ten-year-old girl who fell face down while sucking on one of the defendant's toothpicks. 413 N.E.2d 767 (Mass. App. 1980). The court found that toothpicks, like other sharp objects such as pencils, nails, knives,

and bottles, are not unreasonably dangerous in part due to the fact that the very obviousness of their danger puts the user on notice. "It is part of normal upbringing that one learns in childhood to cope with the dangers posed by such useful everyday items and will be injured, but the policy of our law in such cases is not to shift the loss from the careless user to a blameless manufacturer." Id. at 770. Like the court in Killeen which held that the manufacturer was not liable for failing to child-proof the useful product which posed obvious potential dangers, this court also will not hold BIC responsible on this basis.

The plaintiff contends that public policy requires this court to hold the defendant strictly liable for its product. he plaintiff correctly points out that the Illinois Supreme Court stated in Suvada that public interest in human life and health, the invitations and solicitations to purchase the product, and the justice of imposing the loss on the one creating the risk and reaping the profit are compelling reasons for holding manufacturers of defective and unreasonably safe products liable to injured consumers. 32 Ill.2d 612, 210 N.E.2d at 186. However, as the consumers.

32 Ill.2d 612, 210 N.E.2d at 186. However, as the Suvada court's finding suggests, public policy only requires holding manufacturers and sellers liable if their products, see Scoby v. Vulcan-Hart Corp., 211 Ill. App. 3d 410, 516 N.E.2d 670 (1987). As already discussed, manufacturers are only required to make reasonably dangerous, public policy does not mandate that this court has determined that the defendant's lighter was not unreasonably dangerous, public policy does not mandate that this court hold the defendant strictly liable.

BIC is also entitled to summary judgment on the products liability claims because the warning on the lighter at issue in this case was adequate. As previously noted, a failure to warn of the dangerous propensities of its product can serve as the basis for holding a defendant manufacturer or seller strictly liable in tort. Woodill, 79 Ill.2d 26, 402 N.E.2d at 196; First National Bank of Dwight, 803 F.2d at 1460. However, no duty to warn is warranted when the product is not defectively designed or manufactured, and where the possibility of injury results from a common propensity of the product which is open and obvious. Genaust v. Illinois Power Company, 62 Ill.2d 456, 343 N.E.2d 456

(1976); Restatement Second of Torts, Section 402A, comment i. Given that this court has already determined that the lighter at issue was not defective and the injury resulted from the products obvious propensity for danger, the defendant did not have the duty to warn which the plaintiff suggests. In this case, the defendant nevertheless provided a warning to keep the lighter away from children. According to the Restatement, "Where a warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed is not in a defective condition, nor is it unreasonably dangerous." Restatement Second of Torts, Section 402A, comment i. The defendant in the instant case cannot be held liable for a failure to warn because had the warning on the lighter been heeded, the lighter could have been used safely.

In addition, defendant BIC suggests, and the court agrees, that additional warnings may not have prevented the accident in this case. As explained in the background section of this opinion, the plaintiff and the other adults in the Smith/Todd household testified that they knew of and warned their children about the dangers of playing with lighters or

other flammable devices. Cori Smith also testified that she had been warned of and understood the dangers of playing with such products. These statements suggest that the Todds and the Smiths clearly understood the potential dangers of children playing with lighters and that the warning provided by the defendant was adequate. Since the alleged lack of additional warnings could not have been the cause of the fire at issue in this case, the defendant also is entitled to summary judgment on this basis.

The court's determination that the plaintiff cannot prove his strict products liability claims because the defendant has not violated his duty to manufacturer reasonably safe products and to warn also applies to the plaintiff's negligence claims. To establish a claim for negligence under Illinois law, a plaintiff must prove: 1) the existence of a duty owed by the defendant to the plaintiff, 2) a breach of that duty, and 3) an injury proximately caused by that breach. Ward, 136 Ill.2d 312, 554 N.E.2d at 226. The negligence requirement that the plaintiff establish that the defendant owed him or her a duty is very similar to the duty requirement for

proving strict products liability.[2] As the court stated in Coney, "the breach of duty is the same in both a negligence and strict products liability claim but the key distinction between the negligence and the strict liability claim lies in the fault concept. In a negligence claim, the focus is on the fault of the defendant. In a strict products liability claim, the focus is on the condition of the product, regardless of fault." 97 Ill.2d 104, 454 N.E.2d at 203. Since the duty requirement in a negligence claim is the same as a duty requirement in a products liability claim, and this court has determined that the defendant did not have a duty to manufacture the lighter with a child-resistant device or additional warnings,

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[2] This court respectfully disagrees with the court's holding in Scarpetta regarding the plaintiff's claim that the defendant was liable under negligence law for failing to child-proof its lighters and not providing an adequate warning. See 1990 U.S. Deist. LEXIS 5119. The court in Scarpetta did not conclude that the duty requirement under strict products liability and negligence law were the same. The court therefore decided the duty questions on different factors and reached different results. See Id.

the defendant is also entitled to summary judgment on the negligence claims.

Conclusion

For the reasons stated above, the defendant BIC's motion for summary judgment is granted.

E N T E R:

Ann Claire Williams, Judge
United States District Court

Dated: January 7, 1992

Supreme Court, U.S.
SEP 23 1994

No. 94-351

IN THE
SUPREME COURT OF THE UNITED STATES

RODNEY TODD, as Special Administrator of the Estate of TIFFANY TODD, a deceased minor,

Petitioner,

v.

SOCIETE BIC, S.A. and BIC CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS SOCIETE BIC, S.A. AND BIC CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner has identified special and important reasons, as required by Rule 10.1 of the Rules of the Supreme Court of the United States, for the review of the decision of the United States Court of Appeals for the Seventh Circuit in a case involving state law claims exclusively, when no constitutional or federal question has been raised and in the absence of a conflict between the Court of Appeals' decision and the decisions of other United States Courts of Appeals or the Supreme Court?

2. Whether the United States Court of Appeals for the Seventh Circuit was within its grant of power to decide a question of state law which the Illinois Supreme Court specifically declined to address?

3. Whether the United States Court of Appeals for the Seventh Circuit properly invoked its power in granting rehearing *en banc*?

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JURISDICTIONAL STATEMENT

Respondents received the Petition for a Writ of Certiorari on August 25, 1994. This brief is filed on behalf of both Respondents, Societe BIC, S.A. and BIC Corporation.[1]

STATEMENT OF THE CASE

I. FACTUAL RECITATION

On March 27, 1988 at the home of the Smith and Todd families in Earleville, Illinois, a fire started by Cori Smith caused the death of Tiffany Todd. During the relevant time period, Herbert and Kathy Smith and their family, and Darlene and Rodney Todd, Sr. and their family all lived in the same house on Rural Route #3 in Earleville, Illinois. All the adults in the household smoked cigarettes at or around the time of this incident. Herbert Smith used a Zippo lighter to light his cigarettes; Kathy Smith used a BIC lighter to light her cigarettes; Darlene Todd used a BIC lighter or matches to light her cigarettes; and Rodney Todd, Sr. did not recall what he used to light his cigarettes at that time. Kathy Smith and Darlene Todd have both used BIC lighters since this accident.

Sometime before 8:00 a.m. on March 27, 1988, 4-year-old Cori Smith, who had been sleeping with her parents in their downstairs bedroom, awoke and walked into the living room of the home. Cori found a green lighter on the end table in the living room, proceeded upstairs to the bedroom in which 22-month-old Tiffany Todd was sleeping and ignited some papers. After igniting and leaving the burning paper on the floor of the upstairs bedroom, Cori walked back downstairs and replaced the lighter on the end

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[1] Pursuant to Supreme Court Rule 29, lists of Respondents' subsidiaries which are not wholly-owned are found at pages 18 and 19 of this Brief.

table from which she had obtained it initially. Cori then obtained a glass of water and attempted to walk back upstairs in order to extinguish the fire. After a brief conversation with her brother, Nathan Smith, Cori apparently ascended the stairs and came running back down. Rodney Todd, Jr., who had been in another upstairs bedroom, followed Cori downstairs yelling that there was a fire in the upstairs bedroom where Tiffany was sleeping. The shouts from the children in the living room brought the adults, who were still in bed, rushing to the living room. Certain unsuccessful attempts were made to rescue Tiffany from the burning upstairs bedroom. The fire and the smoke in the home became so intense that the occupants exited when the fire department arrived.

Approximately one hour after the fire was extinguished, Commander James Hollenbeck, of the Office of the Illinois State Fire Marshall, Division of Arson Investigation, was contacted in connection with the fire. After arriving at the scene, Commander Hollenbeck conducted an investigation which included interviewing Herbert Smith regarding his knowledge as to the cause of the fire. Mr. Smith told Commander Hollenbeck that approximately one week prior to the accident, Cori had obtained a cigarette lighter and started a small fire in her parents' bedroom. Commander Hollenbeck also interviewed Cori who said that she had started the fire which was under investigation. Commander Hollenbeck testified that based upon his investigation of the fire, there was no evidence or information that the lighter which Cori allegedly used malfunctioned in any way.

In connection with the use of lighters, both Herbert Smith and Kathy Smith testified that they were aware of the potential danger of children playing with fire and specifically warned their children, including Cori, not to play with lighters or matches. Similarly, Rodney Todd, Sr. had advised his children not to play with

matches or lighters because of the potential for injury posed by playing with fire. In fact, approximately one week prior to the fire which caused Tiffany's death, Darlene Todd had warned Cori not to play with fire, matches or lighters. Indeed, Cori also testified that prior to this accident, she was aware that she should not play with lighters or matches because she knew that being near fire was not safe. Warnings and instructions to "KEEP OUT OF REACH OF CHILDREN" or "KEEP AWAY FROM CHILDREN" have always accompanied BIC lighters.

In addition to the facts set forth above, Respondents admitted for the purpose of the summary judgment motion only, that it was feasible to design a lighter with enhanced child-resistant features and that it was foreseeable that a child of the approximate age of Cori could obtain and operate a BIC lighter.[2]

II. PROCEDURAL POSTURE

On March 26, 1990, Petitioner filed a complaint at law in the circuit court of Cook County, City of Chicago, State of Illinois. Respondents timely removed this case to the United States District Court, Northern District of Illinois, Eastern Division. Petitioner's Complaint at law sought to recover on a wrongful death claim against BIC Corporation under the theories of strict liability and negligence alleging a design defect in the BIC lighter, strict liability and negligence alleging inadequate warnings provided with the BIC lighter, and abnormally dangerous activity. This last theory of recovery was not pursued by Petitioner at the trial court level.

Respondents moved for summary judgment on all claims. By

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[2] Contrary to Petitioner's assertions, Respondents did not concede that, at the time of this accident, it had developed a marketable lighter with enhanced child-resistant features.

Order dated January 7, 1992, the Honorable Ann Claire Williams, United States District Court Judge, granted Respondents' motion for summary judgment in all respects. (App. F1-F14)[3]. Petitioner appealed the trial court's order to the Court of Appeals for the Seventh Circuit which, by opinion filed April 27, 1993, reversed the trial court's judgment. (App. D1-D17). By Order dated July 2, 1993, the United States Court of Appeals for the Seventh Circuit voted, by a 9 to 2 margin, to vacate the April 27, 1993 opinion and to rehear this matter *en banc*. (App. C1, A2 n.1). On November 11, 1993, the United State Court of Appeals for the Seventh Circuit, in a 6 to 5 *en banc* opinion, certified two questions to the Illinois Supreme Court; however, Judge Easterbrook, writing for the majority, specifically invited the Illinois Supreme Court to review any aspect the case and reformulate the certified questions as necessary. (App. B1-B25, B11). On November 22, 1993, the Illinois Supreme Court declined to answer the certified questions. (App. E1).

On April 12, 1994, the United States Court of Appeals for the Seventh Circuit issued a second 6 to 5 *en banc* decision affirming the trial court's grant of summary judgment on behalf of Respondents in all respects. (App. A1-A31). By Order dated May 26, 1994, the United States Court of Appeals for the Seventh Circuit denied Petitioner's Petition for Rehearing and Suggestions for Rehearing *En Banc*. (App. A32-A33).

On August 25, 1994, counsel for Respondents received the Petition for a Writ of Certiorari. It is in opposition to this petition that Respondents submit this brief.

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[3] The abbreviation "App." refers to the Appendices attached to Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENTS

The petition fails to present questions warranting this Court's attention. This action concerns construction of state law exclusively. No federal or constitutional questions are presented. Further, no direct conflict exists between the Court of Appeals' decision and the decisions of any other Court of Appeals or of this Court.

The Court of Appeals properly applied Illinois law in affirming the trial court's grant of summary judgment on all claims. The Court of Appeals reviewed the historical development of Illinois product liability law and concluded that the precise issue presented on appeal had not been squarely addressed by the Illinois Supreme Court. For this reason, the Court of Appeals certified certain questions to the Illinois Supreme Court which declined to address the questions. As a result, it was incumbent upon the Court of Appeals to interpret Illinois law by reference to intermediate appellate court decisions. Accordingly, the Court of Appeals determined that the Illinois Supreme Court would not conclude that an ordinary disposable lighter is unreasonably dangerous.

The Court of Appeals has the congressional grant of power to order rehearing of any matter *en banc*. Under the circumstances of this case, a sufficiently important question was raised so as to require the rehearing *en banc*.

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS FAILED TO DEMONSTRATE SPECIFIC AND IMPORTANT REASONS FOR THIS COURT'S DISCRETIONARY REVIEW OF THE COURT OF APPEALS' DECISION

This Court ordinarily employs its certiorari jurisdiction only under extraordinary circumstances in order to resolve conflicts

among the federal circuit Courts of Appeals and the state courts concerning the meaning of federal law. See Braxton v. United States, 500 U.S. 344, 347 (1991). The petition in this case focuses exclusively on the United States Court of Appeals for the Seventh Circuit's interpretation of Illinois substantive law. Certiorari is not ordinarily granted to review federal court decisions construing state laws. Commissioner v. Estate of Bosch, 387 U.S. 456, 462 (1967) ("The issue presents solely a question of state law and '(w)e ordinarily accept the determination of local law by the Court of Appeals...and we will not disturb it here.'" (citations omitted)). This Court rarely overturns the determinations of state substantive law when made by the Courts of Appeals particularly when the same conclusions are drawn by a federal district court. *See* Butner v. U.S., 440 U.S. 48, 58 (1979)("The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues."); *see also* Appalachian Power Co. v. Amer. Institute of Certified Public Accountants, 80 S.Ct. 16 (1959)(denying application for order staying mandate when none of the questions proposed to be presented by petitioners in petition for certiorari had prospect of commanding four votes for review). Indeed, this Court has recognized the value of the district courts' and Courts of Appeals' decisions and has gone so far as to foreclose review of decisions on state law even though a different conclusion may be justified. See Bishop v. Wood, 426 U.S. 341, 346 (1976)("[t]his Court has accepted the interpretations of state law in which the district court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.").

Petitioner raises no federal or constitutional questions. There are no issues that establish a conflict among the Courts of Appeals

regarding the application of any federal law or that establish a direct conflict between the Court of Appeals' decision in this case and other decisions of this Court. Simply put, Petitioner is seeking review from this court of a state law issue which has been the subject of one district court opinion and three Court of Appeals' opinions. The petition in this case does not serve to further substantial justice or judicial economy but merely prolongs a juridical odyssey which began nearly three years ago with the district court's memorandum and order. The petition in this case is nothing more than an invitation to this Court to cast aside its long held practices of accepting the Court of Appeals determination of local law, and to engage in a *de novo* review of Illinois substantive law when the Illinois Supreme Court itself has refused to do so. Accordingly, in the absence of any prior Supreme Court decisions that are at odds with the Court of Appeals' ruling in this case, Petitioner has wholly failed to demonstrate specific and important reasons to justify this court's acceptance for certiorari.

II. THE COURT OF APPEALS PROPERLY EXERCISED ITS POWER IN DECIDING THE CORRECT APPLICATION OF ILLINOIS SUBSTANTIVE LAW

Petitioner argues that the Court of Appeals erroneously interpreted Illinois law in arriving at its conclusions. Petitioner further argues that the Court of Appeals improperly relied on intermediate appellate decisions while ignoring Illinois Supreme Court decisions. Petitioner's arguments are untenable given the procedural posture and legal reality of this case.

At the trial court level, Petitioner had two principal theories: (1) Respondents provided an inadequate warning with its lighters; and (2) Respondents had a duty to incorporate enhanced child-resistant features in an ordinary disposable lighter, and the failure to do so gave rise to claims of strict liability and negligence.

The trial court granted summary judgment on all claims against Respondents holding, among other things, that Respondents' warnings were adequate as a matter of law and that BIC was not strictly liable or negligent for failure to include enhanced child-resistant features in the BIC lighter used by Cori Smith. In arriving at the second conclusion, the court determined that, under Illinois law, the appropriate test for determining whether a product is unreasonably dangerous is set out in Restatement (Second) of Torts, § 402A, Comment i (1965). This test is referred to as the "consumer-contemplation test" and states that a product is unreasonably dangerous "when it is 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'" Palmer v. Avco Distribution Corp., 82 Ill. 2d 211, 216, 45 Ill. Dec. 377, 412 N.E.2d 959 (1980), quoting Restatement (Second) of Torts, § 402A, Comment i (1965). (App. F7-F18).

Petitioner appealed the trial court's determination to the United States Court of Appeals for the Seventh Circuit which, in a 2 to 1 decision, reversed the trial court's rulings, holding that genuine issues of fact existed regarding the adequacy of Respondents' warnings, that the consumer-contemplation test was misapplied by the trial court and that the trial court failed to apply the "risk-benefit" or "risk-utility" analysis discussed in the Illinois Supreme Court case of Lamkin v. Towner, 138 Ill. 2d 510, 563 N.E.2d 449 (Ill. 1990). (App. D5-D8).

Expressing great concern about the implications of the three judge panel's reasoning, the full Court of Appeals for the Seventh Circuit vacated the panel's decision and set the case for rehearing *en banc* (App. C2, B2). The Court unanimously affirmed the trial court's summary disposition of Petitioner's failure to warn claim

and in a 6 to 5 decision, determined that certification to the Illinois Supreme Court was appropriate given the lack of clarity of Illinois law on the design defect issues raised in this case. Contrary to Petitioner's assertions in the petition for certiorari, the Illinois Supreme Court was not limited to the questions certified but, as Judge Easterbrook stated:

> It may be that when revisiting the state's law of products liability the Justices of the Supreme Court of Illinois will conclude that these are not the right questions. In that event, the Justices should feel free to reformulate the questions, just as they would when dealing with the issues posed in a petition for leave to appeal. It is not our purpose to constrain the state court.

(App. B11).

Five Court of Appeals judges dissented from the vote for certification. The dissenting judges concluded that although the majority correctly affirmed the trial court's summary judgment order on the warning claim, it inappropriately certified the case to the Supreme Court of Illinois when reference to the appropriate Illinois case law led one to the inevitable conclusion that a BIC lighter without enhanced child-resistant features was not an unreasonably dangerous product. Indeed, certification of these questions to the Illinois Supreme Court delayed the inevitable. As Judge Posner stated:

> I voted to rehear the case *en banc*; I think we should bite the bullet and decide it now. By certifying these questions to the Supreme Court of Illinois, we merely delay the resolution of the case, impair the proper operation of the common law process, and burden another court.

(App. B21).

The Illinois Supreme Court declined to accept certification. (App. E1).

As a result of the Illinois Supreme Court's refusal to consider the issues in this case, it was incumbent upon the Seventh Circuit Court of Appeals to interpret Illinois law and make a determination of the remaining issues. The five dissenting judges from the first *en banc* opinion were joined by Judge Easterbrook to form the majority in the second *en banc* decision, affirming the trial court's summary judgment on Petitioner's design defect claim. Writing for the majority, Judge Manion properly acknowledged the Court of Appeals' role in determining cases of state substantive law:

> We will resolve the issues of state law which this case presents in accordance with the decisions of the Illinois Supreme Court. See Charles A. Wright, Arthur R. Miller and Edward H. Cooper, Federal Practice and Procedure § 4507 at 89 (1982)("Federal court must determine issues of state laws as it believes the highest court of the state would determine them"). Where areas of state law are not developed, we will resort to other persuasive authority in an attempt to determine what the Illinois Supreme Court would decide. See Heller Intern. Corp. v. Sharp, 974 F.2d 850, 858 (7th Cir. 1992).

(App. A5).

In applying Illinois law, the majority determined that the Illinois Supreme Court would not apply the risk-utility test in analyzing whether a BIC disposable lighter was defective in design for failure to incorporate enhanced child-resistant features and that

the case of Lamkin v. Towner, *supra*,[4] did not mandate the application of a risk-utility test to simple but obviously dangerous products. (App. A19).

In fact, the Illinois intermediate court decision of Scoby v. Vulcan-Hart Corp., 211 Ill. App. 3rd 106, 569 N.E.2d 1147 (4th Dis. 1991), appeal denied, 141 Ill. 2d 560, 580 N.E.2d 135 (1991) provided the most insightful analysis of Illinois law and the greatest assistance to the Court of Appeals in predicting how the Illinois Supreme Court would decide the issues presented in this case. In concluding that the Illinois Supreme Court would not apply the risk-utility test under the circumstances of this case, the majority observed:

> No Illinois court has applied the risk-utility test to a simple but obviously dangerous product. We need not expand upon the Illinois Supreme Court's already broad statement of Lamkin, and apply the test to such a product. If the question before us was, simply, "Does Illinois authorize the risk-utility test to determine whether a product is unreasonably dangerous?" the answer would be clear. Certainly, the Illinois Supreme Court has authorized use of the test in some cases. But the question before us is slightly different: "Does Illinois authorize use of the risk-utility test for a simple product which poses an obvious danger?" The answer to this question in not so clear. The Illinois Supreme Court has

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[4] Petitioner also argues that the holding in the Illinois Supreme Court case of Doser v. Savage Mfg. & Sales Inc., 142 Ill. 2d 176, 568 N.E.2d 814 (1990) requires reversal of the second *en banc* decision. However, the majority correctly observed that Doser is inapplicable to this case because Doser "never even *mentions* the consumer contemplation test." (App. 11 n.4).

> never applied the test to such a product. An intermediate appellate court has determined that it never will. Scoby, 569 N.E.2d at 1151. Our task in a diversity case is to predict what the state's highest court would do if presented with the same issue. See Heller, 974 F.2d at 858; see also Wright, Miller and Cooper, § 4507 at 94 ("If the state's highest court has not ruled on an issue, intermediate appellate court decisions constitute the next best indicia of what state law is."). Based on our examination of past and current Illinois case law, we agree with the appellate court which decided Scoby, that the Illinois Supreme Court would not apply the risk-utility test to simple and obviously dangerous products. *Accord* Mason v. Ashland Exploration Inc., 965 F.2d 1421, 1428 (7th Cir. 1992)(treating Scoby as authoritative reading of Lamkin).

(App. A18-A19).

The majority's interpretation of Illinois law is clearly within its constitutional grant of power and in accord with this Court's holding in Erie v. Tompkins, 304 U.S. 64 (1938). In an attempt to ascertain the correct interpretation of Illinois law, the Court of Appeals certified this case to the Illinois Supreme Court. Unable to obtain an answer from the Illinois Supreme Court, the Court of Appeals embarked upon a thorough and searching analysis of Illinois law, using all available data in order to predict how the Illinois Supreme Court would decide this matter. As this Court has held:

> [a]n intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by

other persuasive data that the highest court of the state would decide otherwise.

West v. AT&T, 311 U.S. 223, 237 (1940)(citations omitted).

Contrary to Petitioner's assertion, the Court of Appeals did not usurp the power of the Illinois Supreme Court in deciding this case. The Court of Appeals discharged its duty by deciding this case. Petitioner requests that this Court invoke its discretionary jurisdiction in order to supplant not only the Court of Appeals' judgment but to somehow step into the shoes of the Illinois Supreme Court and decide issues which the Illinois Supreme Court has refused to address. Such a process not only undermines the authority of the Court of Appeals but that of Illinois' highest tribunal. The Court of Appeals is in the best possible position to decide this case given its current procedural posture. This Court succinctly characterized the value of the Court of Appeals' decision-making process when it observed:

> Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multi-judge panels, See 28 U.S.C. §§ 46(b) and (c), that permit reflective dialogue and collective judgment.

Salve Regina College v. Russell, 499 U.S. 225, 232 (1991).

The Court of Appeals in this case focused on Scoby, an

intermediate appellate court decision, and used this decision as a barometer for predicting how the Illinois Supreme Court would determine the questions of law presented in this case.[5] The Illinois Supreme Court has remained silent on these issues. The United States Court of Appeals for the Seventh Circuit has not. The Court of Appeals has expended a great number of judge-hours and has generated in excess of 70 pages of judicial opinion in arriving at its final decision. Respondents respectfully submit that this Court should not now substitute its judgment for that of the Court of Appeals when such an intrusion is unwarranted and unjust.

III. THE COURT OF APPEALS PROPERLY INVOKED ITS POWER IN GRANTING REHEARING *EN BANC*

Finally, Petitioner challenges as improper the exercise of the Court of Appeals' authority to rehear this matter *en banc*.[6] Interestingly, Petitioner fails to note that 9 of the 11 judges in active service on the Court of Appeals voted to vacate the original three judge panel's decision and to rehear this matter *en banc*. (App. A2 n.1.). Moreover, it has long been held that the power to order a rehearing *en banc* is squarely invested with the Courts of Appeals. As this Court observed:

[I]n our view, [28 U.S.C.] § 46(c) is not addressed to

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[5] This Court has repeatedly underscored the value of intermediate appellate state court decisions when a state's highest court refuses to review those decisions. *See* King v. Order of United Commercial Travelers of America, 333 U.S. 153, 158 n.13 (1948).

[6] Petitioner seems to overlook that he petitioned for rehearing with a suggestion for rehearing *en banc* after the second *en banc* decision was unfavorable to him. The petition and suggestion were subsequently denied. (App. A33).

> litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.

Western Pac R. Corp. v. Western Pac R. Co., 345 U.S. 247, 250 (1953).

The procedure of granting an *en banc* hearing is normally used to address issues of exceptional importance and/or to secure or maintain the uniformity of decisions within the circuit. Moody v. Albemarle Paper Co., 417 U.S. 622, 626 (1974). As this Court has stated:

> [I]n the wise use of this exceptional power to 'determine the major doctrinal trends of the future' for a particular circuit, American-Foreign, 363 U.S., at 690, 80 S.Ct., at 1339, Congress appears to have contemplated the need for an intimate and current working knowledge of, among other things, the decisions of the circuit, its pending cases, and the magnitude and nature of its future work load.

Id. at 627.

In the final analysis, the Court of Appeals properly exercised its power to grant a rehearing *en banc* in order to correct a manifest misinterpretation of Illinois law and to maintain the uniformity of its decisions with respect to Illinois product liability law. The *en banc* proceeding in this action provided substantial justice and a proper resolution of this matter. There is no error for this Court to correct.

CONCLUSION

Petitioner has failed to present specific and important reasons to invoke this Court's discretionary review of the Court of Appeals' decision. There is no federal question or constitutional question involved in this action. This petition merely focuses on the Court of Appeals' interpretation of Illinois substantive, product liability law. Given the thorough and extensive review of Illinois case law, the Court of Appeals correctly concluded the Petitioner's claims were not maintainable under Illinois law. The Illinois Supreme Court declined to address the substantive issues raised in this case, thus requiring the Court of Appeals to predict how the Illinois Supreme Court would resolve this matter. The Court of Appeals' determinations were reasonable and should not be disturbed.

For the foregoing reasons, Respondents respectfully request that this court deny the Petition for a Writ of Certiorari.

Dated: September 21, 1994

Respectfully submitted,

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